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Joseph Satorius

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Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement

Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law.

STRIKE OR DISMISS: INTERPRETATION OF THE BAPCPA 109(h) CREDIT COUNSELING REQUIREMENT

*Joseph Satorius**

INTRODUCTION

In early December 2005, Guillermo Alfonso Sosa and his wife Melba Nelly Sosa were in danger of losing their home to foreclosure.¹ Finding themselves in a financial storm, Mr. and Mrs. Sosa sought the only shelter in sight—the bankruptcy court—only to have the door slammed in their faces. Had the Sosas sought protection two months earlier, the door would have been wide open. Unfortunately, because they turned to the bankruptcy court after October 17, 2005, the door was barred and locked. Surely, Mr. and Mrs. Sosa must have committed some grave offense to receive such a severe response.

The door was locked not because the Sosas had sought protection in bad faith, nor because they had strategically planned to defraud creditors by sheltering their home in bankruptcy. In fact, Mr. and Mrs. Sosa had been working with their mortgage company to determine the exact amount that was owed, until the last moment, when the mortgagee refused to accept the payment and decided to foreclose.² The door to bankruptcy was locked because Mr. and Mrs. Sosa had failed to receive credit counseling from a nonprofit credit counseling agency.

Such results are common following the new credit counseling requirement of the revised Bankruptcy Code, The Bankruptcy Abuse and Consumer Protection Act (BAPCPA),³ effective as of October 17, 2005. BAPCPA implemented the most dramatic changes to the bankruptcy process since the Bankruptcy Code was enacted in 1978.⁴ One such change is section 109(h), the provision requiring individuals to obtain credit counseling from a nonprofit credit counseling agency within the 180 days preceding a bankruptcy filing.⁵ With few and limited exceptions,⁶

* J.D. Candidate, 2008, Fordham University School of Law.

1. *In re Sosa*, 336 B.R. 113, 114-15 (Bankr. W.D. Tex. 2005).

2. *Id.* at 115.

3. Bankruptcy Abuse and Consumer Protection Act of 2005, 11 U.S.C.A. §§ 101-9036 (West 2004 & Supp. 2006).

4. *In re Tomco*, 339 B.R. 145, 151 (Bankr. W.D. Pa. 2006).

5. 11 U.S.C.A. § 109(h).

6. *Id.* § 109(h)(2)-(4); see also *infra* notes 21-25 and accompanying text.

counseling is a prerequisite to bankruptcy relief. The inflexibility of this requirement locks many good faith debtors, such as the Sosas, out of the bankruptcy court and leaves them frozen outside in a financial storm.

The motives behind the requirement have been the subject of harsh skepticism.⁷ Indeed, the bankruptcy judge in the *Sosa* case stated that he views the requirement as “inane” and that “to call the Act a ‘consumer protection’ Act is the grossest of misnomers.”⁸ Nonetheless, the court noted that its “hands are tied” and dismissed the case because “[t]he statute is clear and unambiguous.”⁹

The real problem with the counseling requirement, however, is that even if Mr. and Mrs. Sosa were to obtain credit counseling and return to the court, the punishment would continue. Another provision of BAPCPA imposes an automatic bad faith presumption when the Sosas return a second time. Section 362(c)(3) of BAPCPA imposes this bad faith presumption and terminates the automatic stay¹⁰—the crown jewel of bankruptcy protection—after thirty days unless the debtor can rebut the presumption.¹¹ “[T]his avenue,” as one court noted, “poses significant burdens on debtors.”¹² Thus, an individual like Mr. Sosa, who innocently seeks protection by knocking on the door of the bankruptcy court, triggers a string of events that may result in a complete bar to the bankruptcy system.

While all courts agree that the bankruptcy door is closed to an individual who has not received credit counseling,¹³ courts disagree as to how the debtor should be turned away. This Note analyzes this divergence in section 109(h) jurisprudence. Some courts hold that the filing of a petition in violation of 109(h) commences a case and that the proper remedy is to dismiss the case.¹⁴ Under this interpretation, if a debtor subsequently obtains credit counseling and refiles, the debtor must face the “significant burdens” of rebutting the 362(c)(3) bad faith presumption to avoid having the automatic stay lifted after thirty days. Other courts hold that the filing of a petition in violation of 109(h) should merely be stricken, allowing the debtor to obtain the counseling and return without the bad faith presumption.¹⁵

The decision of whether to strike or dismiss the petition of an individual who files for bankruptcy without receiving credit counseling is much more

7. See Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 Am. Bankr. L.J. 191, 191-92 (2005) (“[M]any of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice.”); see also *In re Sosa*, 336 B.R. at 114.

8. *In re Sosa*, 336 B.R. at 114.

9. *Id.* at 115.

10. 11 U.S.C.A. § 362(a); see also *infra* notes 58-60 and accompanying text.

11. *Id.* § 362(c)(3).

12. *In re Seaman*, 340 B.R. 698, 709 (Bankr. E.D.N.Y. 2006).

13. See *infra* note 65.

14. See *infra* Part II.A.

15. See *infra* Part II.B.

than a purely academic argument about legal technicalities. Because dismissing a petition limits future bankruptcy benefits, the label of “dismiss” or “strike” has very real implications for many financially distressed individuals.

Part I of this Note outlines the 109(h) credit counseling requirement and its relation to other sections of BAPCPA. It also analyzes the legislative history behind the provision. Part II discusses the judicial split over the proper interpretation of 109(h). Part II.A analyzes opinions that dismiss cases when petitions are filed in violation of 109(h), Part II.B analyzes opinions that strike petitions, and Part II.C analyzes a potential third option of striking petitions with prejudice to future filings. Finally, Part III argues that the proper interpretation of the statute requires courts to strike petitions, or upon a finding of bad faith, to strike petitions with prejudice to future filings. It relies on a plain reading of the statute, prior interpretations of the Bankruptcy Code, and legislative intent to conclude that petitions filed in violation of 109(h) must be stricken.

I. BACKGROUND

Part I of this Note discusses the background of section 109(h) and the legislative purpose of the credit counseling provision. Part I.A describes the specific requirements of the provision and the consequences of failing to obtain credit counseling. Part I.B discusses the legislative purpose behind the enactment of BAPCPA and the credit counseling provision. Part I.C illustrates how the credit counseling provision fits into the larger BAPCPA statute.

A. *Credit Counseling*¹⁶

In order to qualify for bankruptcy relief, an individual must first qualify as a “debtor” under BAPCPA. BAPCPA sets out a number of “debtor” qualification requirements in section 109, entitled “Who may be a debtor.”¹⁷ For example, section 109 establishes certain conditions for railroads, banks, municipalities, family farmers, and family fishermen.¹⁸ BAPCPA left these provisions relatively unchanged from the 1978 Bankruptcy Code. BAPCPA, however, did add a credit counseling requirement—an entirely new condition required for an individual to qualify as a debtor under section 109.¹⁹

16. For a history of the credit counseling industry, see Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Governmental Affairs, *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling*, S. Rep. No. 109-55, at 4-5, 34-36 (2005); Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 Am. Bankr. Inst. L. Rev. 549, 553-54 (2005).

17. Bankruptcy Abuse and Consumer Protection Act of 2005, 11 U.S.C.A. § 109 (West 2004 & Supp. 2006).

18. *Id.* §§ 109(a)-(f).

19. *Id.* § 109(h).

The credit counseling provision requires a petitioner to seek credit counseling from an approved nonprofit budget and credit counseling agency within the 180 days preceding the filing of a bankruptcy petition.²⁰ This requirement falls under section 109. Thus, a person must receive credit counseling in order to qualify as a “debtor” for the purposes of bankruptcy. If a petitioner fails to obtain the required credit counseling, he or she will not qualify as a “debtor” under the Act and will be precluded from obtaining bankruptcy relief.

The Act provides for only three exceptions to the counseling requirement.²¹ First, a petitioner is excused from the counseling requirement if the U.S. Trustee or bankruptcy administrator determines that there are no adequate credit counseling agencies in the district.²² Second, a petitioner is excused if the petitioner submits a certification to the court that (i) describes exigent circumstances that merit a waiver of the requirement;²³ (ii) states that the petitioner requested credit counseling services but was unable to obtain the services during the five day period beginning on the date of the request; and (iii) is satisfactory to the court.²⁴ Finally, a petitioner is excused if he or she is unable to obtain counseling due to incapacity, disability, or active duty in a military combat zone.²⁵ If a petitioner does not obtain the required credit counseling certificate and does not fall under one of these three exceptions, the petitioner does not qualify as a “debtor” under section 109 and will be ineligible for bankruptcy relief. Depending on how the bankruptcy court handles the inadequate petition, the

20. *Id.* § 109(h)(1).

21. *Id.* §§ 109(h)(2)-(4).

22. *Id.* § 109(h)(2)(A).

23. Since the enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA), there has developed substantial disagreement on what qualifies as an exigent circumstance. Compare, e.g., *In re Miller*, 336 B.R. 232 (Bankr. W.D. Pa. 2006) (finding that the foreclosure sale of a residence constitutes an exigent circumstance), and *In re Petit-Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006) (finding that a lack of counseling services in the debtor’s language constitutes an exigent circumstance), and *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005) (finding that repossession of a motor vehicle constitutes an exigent circumstance), and *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005) (finding that eviction from a residence constitutes an exigent circumstance), and *In re Graham*, 336 B.R. 292 (Bankr. W.D. Ky. 2005) (finding that the shutoff of residential utility services constitutes an exigent circumstance), with *In re DiPinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006) (finding that the foreclosure sale of a residence does not constitute an exigent circumstance), and *In re Henderson*, 339 B.R. 34 (Bankr. E.D.N.Y. 2006) (finding that the necessity of finding an attorney does not constitute an exigent circumstance), and *In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho 2005) (finding that the garnishment of wages does not constitute an exigent circumstance), and *In re Curington*, No. 05-38188, 2005 WL 3752229 (Bankr. E.D. Tenn. Dec. 7, 2005) (finding that an inability to pay for credit counseling does not constitute an exigent circumstance), and *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (finding that the repossession of motor vehicle does not constitute an exigent circumstance).

24. 11 U.S.C.A. § 109(h)(3).

25. *Id.* § 109(h)(4).

failure to meet the credit counseling requirement can have a significant impact on the petitioner's ability to obtain future bankruptcy relief.²⁶

The drafters of BAPCPA gave consideration to the significant criticism of the credit counseling industry when crafting the credit counseling requirement.²⁷ The focus of the criticism is directed toward aggressive entrants into the credit counseling market that cause high fees, misleading advertising, poor service, and an industry focused on profits rather than debtor counseling.²⁸ The Senate Subcommittee on Investigations under the Committee of Homeland Security and Governmental Affairs issued a 2005 report on these concerns and concluded that "[c]learly, something is wrong with the credit counseling industry."²⁹ To address this concern, Congress stipulated that only credit counseling agencies that are certified as approved providers by the U.S. Trustee can provide the required credit counseling.³⁰

The requirements to become an approved credit counseling agency are outlined in section 111 of BAPCPA.³¹ A credit counseling agency must meet a significant number of conditions before obtaining approval,³² and the list of approved agencies is to be maintained in the office of the clerk of

26. See *infra* Part II for a discussion on the effects of dismissing a petition as opposed to striking a petition where the petitioner has not satisfied the credit counseling requirement.

27. See, e.g., Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Governmental Affairs, *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling*, S. Rep. No. 109-55, at 2-3 (2005) (discussing high fees and poor service); Deanne Loonin & Travis Plunkett, Nat'l Consumer Law Ctr., *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants* 8-9 (2003), available at www.consumerfed.org/pdfs/credit_counseling_report.pdf (stating that counseling agencies have a lack of face-to-face contact with consumers; offer nothing but debt-management plans; promote aggressive and sometimes abusive marketing practices; pick and choose creditors; demand higher costs for service; and maintain close connections with for-profit businesses); Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 Am. Bankr. Inst. L. Rev. 133, 154-56 (1999) ("Placing the responsibility of negotiating pre-petition debt repayment plans in the hands of credit counselors is precarious since the majority of funding for the credit counseling industry comes from commissions and subsidies paid to the credit counseling agencies by credit card issuers.").

28. Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Governmental Affairs, *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling*, S. Rep. No. 109-55, at 1-4.

29. *Id.* at 4.

30. 11 U.S.C.A. § 111.

31. *Id.*

32. *Id.* § 111(c) (providing that an agency must demonstrate that it has a board of directors, the majority of which are not employed by the agency nor will financially benefit from the outcome of the services; charges a reasonable fee and provides services without regard to ability to pay the fee; provides safekeeping and payment of client funds; provides full disclosures to client; provides adequate counseling to client; provides trained counselors who receive no commission or bonus based on the outcome of the counseling; demonstrates adequate experience and background in providing counseling; and has adequate financial resources to provide continuing support services).

the bankruptcy court.³³ The U.S. Trustee of the district must approve the agency as well as the courses and instructional material to be used.³⁴

B. Legislative Intent of BAPCPA and the Credit Counseling Requirement

In the House Judiciary Committee report on BAPCPA, the Committee stated that “[t]he purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”³⁵ In a response to creditor interests, the Committee declared that BAPCPA will “respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.”³⁶ The Committee cited four primary factors as generating the need for bankruptcy reform. First, the Committee noted that the number of bankruptcy filings “nearly doubled to more than 1.6 million cases filed in fiscal year 2004”³⁷ and cited the “growing perception that bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort.”³⁸ While many scholars argue that most bankruptcy filings are a result of sudden tragedy, such as divorce, illness, or unemployment,³⁹ the Committee concluded that reform is nonetheless necessary. Second, the Committee noted the “significant” economic losses associated with insolvent debtors.⁴⁰ Specifically, it was estimated that in 1997, \$44 billion of debt was

33. *Id.* § 111(a).

34. *Id.* §§ 111(b)-(d).

35. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2 (2005).

36. *Id.* (footnote omitted). For an argument that the credit industry, and not opportunistic debtors who “abuse” the bankruptcy system, is responsible for the increase in bankruptcy filings, see Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law*, 84 Tex. L. Rev. 1481, 1488 (2006) (“[Lenders] have increased the riskiness of the credit pool, lending to borrowers who would not have been profitable in a world of informational asymmetries and usury limits . . .”); Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 Theoretical Inquiries in Law 323, 327-32 (2006); Loonin & Plunkett, *supra* note 27, at 1 (“Low creditor concessions cause more consumers to drop off [debtor management plans] and to declare bankruptcy.”).

37. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 4.

38. *Id.*

39. See Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Governmental Affairs, *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling*, S. Rep. No. 109-55, at 2 (2005); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* 15-21 (2000) (citing a study where 67.5% of debtors reported filing because of a job loss, 22.1% reported filing because of a family issue, and 19.3% reported filing because of medical issues, and multiple responses were permitted); Braucher, *supra* note 36, at 332 (“Families are driven to borrow more after job loss, divorce or illness . . .”).

40. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 4.

discharged by debtors through bankruptcy relief and that this loss translated to a \$400 annual “tax” on every household in America.⁴¹ The Committee also referenced a credit industry newsletter⁴² stating that the \$18.9 billion loss to credit card companies from consumer bankruptcy filings in 2002 was an increase of 15.1 percent over the prior year.⁴³ Third, the Committee proclaimed that “the present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse”⁴⁴ and stated that “[a]ccording to the U.S. Trustee Program, ‘[a]buse of the system is more widespread than many would have estimated.’”⁴⁵ Fourth, the Committee questioned the need for many debtors to file bankruptcy, stating that “some bankruptcy debtors are able to repay a significant portion of their debts.”⁴⁶

41. *Id.*

42. *Id.* at 4-5.

43. *Id.*

44. *Id.* at 5; see also Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 Ind. L.J. 1, 45-47 (1987) (concluding that the number of Chapter 7 bankruptcy filings is positively related to the bankruptcy exemption level of the state); Michelle J. White, *Why it Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. Chi. L. Rev. 685, 693-700 (1998). For an argument that consumers are, for the most part, not strategic or opportunistic, see Block-Lieb & Janger, *supra* note 36; F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. Legal Stud. 187, 204-05 (1998) (stating that the bankruptcy filing rate is negatively related to exemption level).

45. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 5 (quoting J. Christopher Marshall, *Civil Enforcement: An Early Report*, J. of the Nat’l. Ass’n. of Bankr. Trustees, Fall 2002, at 39, available at http://www.usdoj.gov/ust/co/public_affairs/articles/docs/nabtalkfall2002.htm). It is interesting to note that the Committee attributes this statement to the U.S. Trustee Program when the statement was in fact written by J. Christopher Marshall, a U.S. Trustee, in a personal capacity. In fact, Marshall’s article provides a disclaimer stating that “[t]he views expressed in this article are those of the authors and do not necessarily represent, and should not be attributed to, the Executive Office for U.S. Trustees, the U.S. Trustee Program, or the Department of Justice.” Marshall, *supra*, at 39 n.1. This misattribution of the statement to the U.S. Trustee Program may arguably be an indication of congressional efforts to overstate the “abuse” of the bankruptcy system in an attempt to justify various reforms needed to appease the financially powerful creditor lobby. Such an assertion and argument, however, is beyond the scope of this Note. For an argument that the creditor lobby exercised significant influence on the formation of BAPCPA, see Sommer, *supra* note 7.

46. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 5 (citing *Bankruptcy Reform Act of 1999 (Pt. II): Hearing on H.R. 833 Before Subcomm. on Commercial and Admin. L. of the H. Comm. on the Judiciary*, 106th Cong. 298 (1999)); *id.* at 5 n.18 (quoting Michael E. Staten of the Credit Research Center, who stated that “about 25 percent of chapter 7 debtors could have repaid at least 30% of their non-housing debts over a 5-year repayment plan”). But see Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 Am. Bankr. Inst. L. Rev. 27, 31 (1999) (“[A]buse of chapter 7, in the form of filings by debtors who could repay . . . appears minimal.”); Stehl, *supra* note 27, at 153 (stating that “the results of several studies leave open the significant question of whether a majority of debtors can even pay a small portion of their non-priority unsecured debt”); Press Release, Nat’l Ass’n of Consumer Bankr. Att’ys, Study: Controversial Bankruptcy Law Reforms Not Working? 97 Percent Unable to

These four factors resulted in a congressional effort to “restor[e] personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”⁴⁷ Within this context, Congress inserted the credit counseling requirement as a prerequisite for obtaining bankruptcy relief.⁴⁸ The House Report on BAPCPA plainly states that the credit counseling requirement is intended as a protection and safeguard for debtors—a final stop on the path to bankruptcy to ensure that the debtor makes an informed choice about filing a bankruptcy petition.⁴⁹ The required counseling session does not have to be a lengthy or exhaustive process for the petitioner. The counseling can be conducted via phone or Internet and must only “outline[] the opportunities for available credit counseling and assist[] such individual in performing a related budget analysis.”⁵⁰ The fact that the counseling requirement can be satisfied with a phone call or Internet session in the final days of a petitioner’s financial distress has caused many scholars to question the usefulness of the counseling.⁵¹

C. A Broader Look at BAPCPA

How does an individual who files a bankruptcy petition fall under the power of the bankruptcy court? Jurisdiction over bankruptcy cases is granted to the federal district courts by 28 U.S.C. § 1334,⁵² and jurisdiction is granted from the district courts to the federal bankruptcy courts by 28

Repay Debts, Most Pushed to Brink by Crisis (Feb. 22, 2002), available at <http://nacba.com/news/releases/022206.php>.

47. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2.

48. See *supra* notes 16-34 and accompanying text.

49. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2 (“[BAPCPA] also includes various consumer protection reforms. . . . It requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences.”); *id.* at 18 (“[C]redit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating . . .”).

50. 11 U.S.C.A. § 109(h)(1) (West 2004 & Supp. 2006).

51. See, e.g., Block-Lieb & Janger, *supra* note 36, at 1561 (“We also question the efficacy of mandatory counseling on the eve of bankruptcy, as required by the 2005 amendments to the Bankruptcy Code.”); A. Mechele Dickerson, *Can Shame, Guilt, or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 Loy. L.A. L. Rev. 945, 952 (1999) (“Requiring debtors . . . to complete a credit-counseling course as a prerequisite to bankruptcy could have dire financial consequences. . . . [M]ost people file for bankruptcy because they need immediate economic relief.”); Stehl, *supra* note 27, at 148 (“It is often preferable for individuals to resolve their financial difficulties outside of the bankruptcy arena. It is highly questionable, however, whether the proposed precondition to bankruptcy relief of credit counseling will achieve that desired result.” (footnote omitted)). For a discussion of the problems of credit counseling agencies requiring payment from financially distressed debtors, see *id.* at 156, 159.

52. 28 U.S.C. § 1334 (2000) (“[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11.”).

U.S.C. § 157.⁵³ The Bankruptcy Code itself does not mention jurisdiction, nor does it grant jurisdiction to the bankruptcy courts.

Assuming that an individual is fully eligible for bankruptcy relief⁵⁴ when filing a bankruptcy petition, a case is commenced pursuant to 11 U.S.C. § 301(a), which states that “[a] voluntary case . . . is commenced by the filing with the bankruptcy court of a petition . . . by an entity that may be a debtor.”⁵⁵ To find out if an entity “may be a debtor,” BAPCPA directs us to section 109, which lists the requirements to qualify as a debtor.⁵⁶ For example, section 109(g) (a pre-BAPCPA requirement that remains unchanged in BAPCPA) provides that an individual is ineligible to be a debtor if he or she has willfully failed to abide by an order of the court, or has requested and obtained the voluntary dismissal of a case.⁵⁷

When an eligible debtor files for bankruptcy, the powerful protection of the automatic stay is invoked under section 362(a).⁵⁸ The automatic stay is “one of the most powerful weapons known to the law”⁵⁹ as it protects the debtor from collection actions by both secured and unsecured creditors.⁶⁰

BAPCPA also outlines circumstances that provide for the dismissal of a case.⁶¹ Under a new BAPCPA provision, section 362(c)(3), dismissal of a case limits the benefits available to the debtor in a future bankruptcy filing.⁶² Section 362(c)(3) dictates that if an individual commences a second bankruptcy case within one year of a previously pending bankruptcy case, the automatic stay is only in effect for thirty days.⁶³ There is a statutory presumption that the second filing is in bad faith, and the burden is on the debtor to rebut the presumption in order to extend the stay past thirty days.⁶⁴ Thus, the decision to dismiss a case can critically affect a debtor’s future bankruptcy options.

53. *Id.* § 157 (“Each district court may provide that any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”).

54. For background purposes, it is important to assume that the individual is fully eligible for relief because the focus of this Note centers on whether a debtor ineligible for bankruptcy can commence a case under title 11.

55. 11 U.S.C.A. § 301(a).

56. *Id.* § 109.

57. *Id.* § 109(g).

58. *Id.* § 362(a).

59. *In re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988).

60. The automatic stay is subject to a handful of exceptions not relevant to this Note. See 11 U.S.C.A. §§ 362(a), (b).

61. *Id.* §§ 521(i), 707, 1112, 1208, 1307.

62. *Id.* § 362(c)(3).

63. *Id.* § 362(c)(3)(A). Without this limitation, the automatic stay is in effect until the bankruptcy court lifts the stay or the debtor emerges from bankruptcy.

64. *Id.* § 362(c)(3)(C). Needless to say, this presumption creates a significant hurdle in the second filing because the ability to rebut the presumption is highly fact specific and the outcome is unpredictable. See *supra* note 12 and accompanying text.

II. JUDICIAL INTERPRETATION OF 109(h): HOW BANKRUPTCY COURTS HANDLE BANKRUPTCY PETITIONERS WHO FAIL TO MEET THE CREDIT COUNSELING REQUIREMENT

Although BAPCPA is little more than one year old, there is already substantial judicial disagreement and confusion over how to interpret the provisions of section 109(h). While courts agree that a debtor who has not satisfied the 109(h) credit counseling requirement is not eligible to be a “debtor” and cannot enjoy the benefits of bankruptcy,⁶⁵ courts disagree on how to handle the bankruptcy petition of an individual who is ineligible to be a debtor under section 109(h). Some courts strike inadequate petitions,⁶⁶ while other courts dismiss the case.⁶⁷ The decision of whether to dismiss or to strike the petition of an ineligible debtor can have serious consequences for the individual per section 362(c)(3).⁶⁸ Thus, a seemingly semantic disagreement becomes a matter of extreme importance to the debtor who has failed to receive credit counseling.

Part II of this Note examines the different methods (strike or dismiss) courts use to dispose of petitions filed in violation of section 109(h). Part II.A explores the arguments advanced by courts that dismiss cases in which petitioners who have failed to obtain credit counseling. Part II.A.1 looks at prior interpretations of the Bankruptcy Code, specifically, section 109(g) and section 109(e). Part II.A.2 discusses a plain reading of the Code, and Part II.A.3 considers the practical consequences of dismissing a case. Part II.B analyzes the arguments advanced by courts that strike petitions filed in violation of section 109(h). Part II.B.1 looks at prior interpretations of the Bankruptcy Code, Part II.B.2 discusses a plain reading of the Code, and Part II.B.3 considers the practical consequences of striking a petition. Finally, Part II.C will examine a possible third remedy: striking petitions with prejudice.

The crux of this disagreement hinges on one crucial question: Does the inadequate petition commence a “case” which must be dismissed by the court, or does the failure to satisfy the 109(h) credit counseling requirement mean that no “case” is commenced and that the proper remedy is to strike the petition? This part will consider both of these approaches in detail.

65. See *In re Elmendorf*, 345 B.R. 486, 495 (Bankr. S.D.N.Y. 2006) (“Section 109(h) has been strictly construed by courts, and all courts that have decided the issue have stated that a debtor that does not receive credit-counseling prior to filing for bankruptcy relief, or seek and receive an ‘extension’ pursuant to 11 U.S.C. § 109(h)(3), is ineligible to be a debtor.”).

66. See *supra* Part II.B (discussing the arguments for striking petitions when a petition is filed in violation of section 109(h)).

67. See *supra* Part II.A (discussing the arguments for dismissing cases when a petition is filed in violation of section 109(h)).

68. See *infra* notes 128-29 and accompanying text.

A. A Bankruptcy Petition Filed in Violation of 109(h) Nevertheless Commences a “Case” Which Must be Dismissed for Such Violation

Courts that dismiss petitions filed in violation of section 109(h) (“dismissal courts”) have determined that a violation of the 109(h) credit counseling requirement does not deprive the court of jurisdiction. The filing of a petition in violation of section 109(h) nonetheless invokes the jurisdiction of the court and therefore commences a “case” which must be dismissed because the petitioner has not received the required credit counseling. Dismissal courts have come to this conclusion by relying on prior interpretations of the Bankruptcy Code, a plain reading of BAPCPA, and the practical consequences of dismissing a case.

1. Prior Interpretations of the Bankruptcy Code

a. Pre-BAPCPA Jurisprudence with Regard to Section 109(g)

In two cases, *In re Seaman*⁶⁹ and *In re Ross*,⁷⁰ bankruptcy courts have looked to prior interpretations of section 109(g),⁷¹ which is another debtor eligibility provision of the Bankruptcy Code, to determine that the new section 109(h) provision of BAPCPA is not jurisdictional. Like 109(h), 109(g) is found under section 109, which is entitled “Who may be a debtor.”⁷² Section 109(g) provides that an individual is ineligible to be a debtor under the Code if he or she has willfully failed to abide by an order of the court or has requested and obtained the voluntary dismissal of a case.⁷³ The *Seaman* and *Ross* courts looked to a pre-BAPCPA case, *In re Flores*,⁷⁴ which considered whether a petition filed by an individual in violation of 109(g) commenced a case.

The *Flores* court concluded that a petition filed in violation of 109(g) is not a nullity and effectively commences a case invoking the subject matter jurisdiction of the court.⁷⁵ The court explained that “a bankruptcy filing [in violation of] 109(g) cannot be a nullity . . . because there is a threshold issue to be decided, the issue of whether the debtor ‘may be a debtor’ in the subsequent case.”⁷⁶ In reaching this conclusion, the court relied heavily on the importance of the automatic stay.⁷⁷ If a petition filed in violation of

69. 340 B.R. 698 (Bankr. E.D.N.Y. 2006).

70. 338 B.R. 134 (Bankr. N.D. Ga. 2006).

71. 11 U.S.C.A. § 109(g) (West 2004 & Supp. 2006).

72. *Id.* § 109.

73. *Id.* § 109(g).

74. 291 B.R. 44 (Bankr. S.D.N.Y. 2003).

75. *Id.* But see *In re Hollberg*, 208 B.R. 755 (Bankr. D.D.C. 1997).

76. *In re Flores*, 291 B.R. at 52.

77. *Id.* at 50 (“It is important to emphasize that the automatic stay is intended for the protection not only of the debtor, but for the benefit of all creditors as well.”); see also *supra* notes 55-57 and accompanying text (explaining that the automatic stay is one of the most important weapons known to law).

109(g) is a nullity, the *Flores* court reasoned, then no case would commence and the automatic stay would not be imposed.⁷⁸ Thus, there would be a period of uncertainty as to whether the automatic stay is in force between the time an individual filed a petition and the time the court determined the petitioner's eligibility under 109(g). During this time, creditors would be uncertain as to whether an automatic stay was in effect or whether they could move forward with debt collection on secured collateral. While some creditors might await the court's determination, other creditors might move forward with debt collection. This reading, the court implied, would allow a secured creditor to make the determination that a petition was filed in violation of 109(g)—a determination which must be left to the court.⁷⁹ Furthermore, this period of uncertainty would allow some creditors to gain a collection advantage over others, a result the *Flores* court noted is wholly at odds with a central purpose of bankruptcy.⁸⁰

Because a petition filed in violation of 109(h) should have essentially the same consequences as a petition filed in violation of 109(g), the *Seaman* and *Ross* courts followed the reasoning in *Flores* and concluded that a petition filed where the individual has not satisfied the 109(h) credit counseling requirement nonetheless commences a case and imposes the automatic stay.⁸¹ If a case is "commenced" when a petition is filed in violation of 109(h), it follows that the proper remedy is dismissal.

b. *Pre-BAPCPA Jurisprudence with Regard to Section 109(e)*

The *Seaman* court looked to another section 109 provision, section 109(e), for guidance on the proper treatment for a petition filed in violation of 109(h).⁸² Section 109(e) provides that a debtor under chapter 13 must have "regular income" and debts that do not exceed proscribed limits.⁸³ Courts have concluded that a chapter 13 petitioner, who is ineligible under

78. See *Avi v. Sears Sav. Bank*, No. 86-6773, slip op. at 1 (9th Cir. Mar. 22, 1989) ("Section 362 provides for an automatic stay following the commencement of a case . . .").

79. *In re Flores*, 291 B.R. at 52-53.

80. *Id.* at 50-51 ("One of the principal purposes of the automatic stay is to preserve the property of the debtor's estate for the benefit of all creditors." (quoting *In re Prudential Lines, Inc.*, 928 F.2d 565, 573-74 (2d Cir. 1991))); see also *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995) ("[A] purpose of the automatic stay is . . . to protect 'creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors.'" (quoting *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991))); *In re Walker*, 51 F.3d 562, 566 (5th Cir. 1995) ("[T]he automatic stay is designed to protect debtors from creditors and creditors from each other.").

81. *In re Seaman*, 340 B.R. 698, 702 (Bankr. E.D.N.Y. 2006); *In re Ross*, 338 B.R. 134, 136 (Bankr. N.D. Ga. 2006) ("Significantly, Congress did not provide a different consequence for § 109(h) ineligibility than for ineligibility under any other provision of § 109. Nothing in the statutory language indicates an intent to establish a new rule for petitions filed by debtors ineligible under § 109(h). It follows that ineligibility under § 109(h) should be treated like ineligibility under any other provision of § 109.").

82. *In re Seaman*, 340 B.R. at 701.

83. 11 U.S.C.A. § 109(e) (West 2004 & Supp. 2006).

109(e), nonetheless commences a case by filing a petition—a case which must be dismissed.⁸⁴ Because 109(e) is found in the same “Who may be a debtor” section as 109(h), the *Seaman* court reasoned that 109(h) merits the same interpretation as 109(e) and that a petition filed in violation of 109(h), like a petition filed in violation of 109(e), commences a case.

2. Plain Reading of the Statute

Courts further conclude that a plain reading of BAPCPA dictates that the 109(h) credit counseling requirement is not jurisdictional in nature and that a petition filed in violation of 109(h) therefore commences a case.

a. *The Jurisdictional Grant of 28 U.S.C. § 1334*

In *In re Tomco*,⁸⁵ the court noted that no provision in BAPCPA mentions jurisdiction⁸⁶ and that bankruptcy courts are granted subject matter jurisdiction over bankruptcy cases through 28 U.S.C. § 1334⁸⁷ and 28 U.S.C. § 157,⁸⁸ not through title 11.⁸⁹ Because the source of jurisdiction flows from title 28 and not title 11, a provision under title 11, such as the 109(h) credit counseling requirement, cannot deprive the bankruptcy courts of jurisdiction.⁹⁰

b. *Other Provisions of BAPCPA*

Other provisions in the Code may also shed light on section 109(h). The *Tomco* court looked to sections 707,⁹¹ 1112,⁹² 1208,⁹³ and 1307⁹⁴ of BAPCPA, which “enumerate circumstances upon which a court may dismiss an individual consumer’s bankruptcy case.”⁹⁵ The *Tomco* court observed that none of the provisions exclude from “‘cause’ for dismissal”

84. See, e.g., *Dillon v. Tex. Comm’n on Env’tl. Quality*, 138 F. App’x 609, 612 (5th Cir. 2005); *In re Seaman*, 340 B.R. at 701-02 (citing *In re Mazzeo*, 131 F.3d 295 (2d Cir. 1997)); *In re Rifkin*, 124 B.R. 626, 629 (Bankr. E.D.N.Y. 1991)).

85. 339 B.R. 145 (Bankr. W.D. Pa. 2006).

86. *Id.* at 159.

87. “[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11.” 28 U.S.C. § 1334 (2000).

88. “Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” *Id.* § 157.

89. *In re Tomco*, 339 B.R. at 159.

90. *Id.* But see *In re Hawkins*, 340 B.R. 642, 646 (Bankr. D.D.C. 2006) (arguing that while a petition filed in violation of 109(h) does not commence a case, the court can assert limited jurisdiction because “[e]very federal court necessarily has the jurisdiction to determine whether it has subject matter jurisdiction over the case or controversy before it.” (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940))).

91. 11 U.S.C.A. § 707 (West 2004 & Supp. 2006).

92. *Id.* § 1112.

93. *Id.* § 1208.

94. *Id.* § 1307.

95. *In re Tomco*, 339 B.R. at 158.

an individual's ineligibility under 109(h).⁹⁶ There is no need for Congress expressly to include ineligibility under 109(h) as an item for "'cause' for dismissal" because Congress states that "cause for dismissal expressly 'includes' the items enumerated therein."⁹⁷ Section 102 of BAPCPA, entitled "Rules of Construction," provides that Congress's use of the term "includes" is "not limiting."⁹⁸ Given these rules of construction, the *Tomco* court determined that "'cause' for dismissal of a bankruptcy case is *not* limited to the enumerated statutory list(s) [of sections 707, 1112, 1208, and 1307], and a debtor's ineligibility [for failure to satisfy section 109(h)] constitutes one such item of cause."⁹⁹ Thus, the *Tomco* court reasoned that dismissing the case when a petition is filed in violation of 109(h) is not at odds with other provisions in the Code.¹⁰⁰

The *Seaman* court further relied on several other sections of the Bankruptcy Code, such as sections 707(a)(3), 1307(c)(9), and 1112(e),¹⁰¹ which list documents that the debtor must file with the court. If the debtor does not file the documents, the case is dismissed. The court used this as further evidence that dismissal is the appropriate remedy for ineligible petitioners.

c. The Surplusage Argument: Section 362(b)(21)(A)

Before the surplusage argument can be properly analyzed, it is essential to note that the foundation of this argument is that the automatic stay¹⁰² is only activated when a case is commenced.¹⁰³ Put another way, if the automatic stay is in effect, there is a case before the court. Section 362(b) provides exceptions to the automatic stay. A new BAPCPA exception under 362(b)(21)(A) states that if a debtor is ineligible under section

96. *Id.*

97. *Id.*

98. 11 U.S.C.A. § 102(3).

99. *In re Tomco*, 339 B.R. at 158 (citing *In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006)).

100. *Id.* at 158; see also *In re Wallert*, 332 B.R. 884, 891 (Bankr. D. Minn. 2005) ("On its face, 11 U.S.C. § 707(a) requires 'cause' before a petition under Chapter 7 may be dismissed. A lack of statutory eligibility to 'be a debtor,' if it goes to a default on the part of the debtor that is incapable of cure under the very terms of the Code, is the very most fundamental 'cause' for dismissal.").

101. *In re Seaman*, 340 B.R. 698, 702-03 (Bankr. E.D.N.Y. 2006) (citing 11 U.S.C.A. §§ 707(a)(3), 1307(c)(9), 1112(e)).

102. See *supra* notes 58-60 and accompanying text.

103. See *Avi v. Sears Sav. Bank*, No. 86-6773, slip. op. at 1 (9th Cir. Mar. 22, 1989) ("Section 362 provides for an automatic stay following the commencement of a case . . ."); *In re Parrish*, 171 B.R. 138, 140 (Bankr. M.D. Fla. 1994) ("The automatic stay [is] imposed routinely upon commencement of a case . . ."); *In re Dexter*, 116 B.R. 92, 93 (Bankr. S.D. Ohio 1990) ("The commencement of a case also activates the automatic stay . . ."). But see *In re Thompson*, 344 B.R. 899, 906 (Bankr. S.D. Ind. 2006) ("This court does not believe that 'commencement' of the case is the exclusive prerequisite for the imposition of the automatic stay.").

109(g),¹⁰⁴ then the automatic stay is not in effect with respect to liens or security interests in real property.¹⁰⁵ Through this provision, Congress identified a specific situation (real property) where an individual ineligible under 109(g) is not protected by the automatic stay. From this, it is inferred that outside of the specific situation involving real property, individuals ineligible under 109(g) are protected by the automatic stay. It is further inferred that petitioners ineligible under other subparts of section 109, such as the 109(h) credit counseling requirement, are protected by the automatic stay.¹⁰⁶ If such petitioners were not protected by the automatic stay, the 362(b)(21)(A) amendment would be unnecessary and superfluous.¹⁰⁷ “As Congress ‘is presumed to know the state of existing law when it enacts legislation,’ the enactment of additional exceptions to the automatic stay evidences the understanding of Congress that a bankruptcy filing in violation of Section 109 commences a case and results in an automatic stay.”¹⁰⁸ To avoid statutory surplusage, it is argued that section 362(b)(21)(A) must be read to conclude that petitioners ineligible under 109(h) are nonetheless protected by the automatic stay; therefore, a case must commence when a petition is filed in violation of 109(h).¹⁰⁹ Because a case is commenced, the proper remedy for a petition filed in violation of 109(h) is dismissal of the case.¹¹⁰

104. See 11 U.S.C.A. § 109(g) (West 2004 & Supp. 2006); see also *supra* notes 69-80 and accompanying text.

105. 11 U.S.C.A. § 362(b)(21)(A).

106. See *In re Racette*, 343 B.R. 200, 202 (Bankr. E.D. Wis. 2006); *In re Seaman*, 340 B.R. at 707-08; *In re Tomco*, 339 B.R. 145, 160 (Bankr. W.D. Pa. 2006); *In re Ross*, 338 B.R. 134, 138-39 (Bankr. N.D. Ga. 2006).

107. *In re Seaman*, 340 B.R. at 707-08; *In re Ross*, 338 B.R. at 139 (stating that “such an amendment would not have been necessary”); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (1984) (Edwards, J., concurring) (“There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it ‘inoperative or superfluous, void or insignificant.’” (quoting 2A C. Sands, *Statutes and Statutory Construction* § 46.06 (4th ed. 1973))).

108. *In re Tomco*, 339 B.R. at 160-61 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)). But see *In re Hawkins*, 340 B.R. 642, 645 (Bankr. D.D.C. 2006) (“There are many reasons why Congress might have amended § 362 in the way that it did. Congress may have focused on § 109(g) because courts were split with respect to the effect of that specific sub-part of the statute at the time of the congressional amendment. In other words, it may be the case that § 109(g)—and only § 109(g)—was on Congress’ mind when it revised § 362. It is therefore no mystery why Congress would amend § 362 to refer to § 109(g) specifically rather than to § 109 as a whole.”).

109. *In re Racette*, 343 B.R. at 203 (“If an ineligible debtor’s petition did not result in a case, presumably there would be no automatic stay and no need for this stay exception.”); *In re Ross*, 338 B.R. at 139 (“The enactment of additional exceptions to the automatic stay thus evidences the understanding of Congress that a filing in violation of § 109(g) commences a case and results in an automatic stay.”).

110. See *In re Ross*, 338 B.R. at 138 (“BAPCPA’s amendments to § 362 confirm that Congress did not view § 109(g) as being a jurisdictional provision.”); *In re Tomco*, 339 B.R. at 160 (“The 2005 Act’s amendments to Section 362 confirm that Congress did not view § 109 as being jurisdictional.”).

d. *Section 301*

Courts like the *Tomco* court that rely on the plain reading of BAPCPA to determine that petitions filed in violation of section 109(h) commence a case must address section 301, a provision found under the subchapter entitled "Commencement of a Case."¹¹¹ Section 301 states that a bankruptcy case "is commenced by the filing with the bankruptcy court of a petition . . . by an entity *that may be a debtor* under such chapter."¹¹² A number of courts, concluding that petitions filed in violation of 109(h) do not commence a case, rely on section 301 as textual support.¹¹³ These courts stated that because a bankruptcy case is only commenced "by an entity that may be a debtor" and because section 109(h) provides that an individual may not be a debtor without obtaining the required credit counseling, it follows that a person filing in violation of 109(h) may not be a debtor, and thus, a case cannot commence under section 301.¹¹⁴ However, the *Tomco* court dismissed this argument with a semantic discussion of the word "may" as used in section 301.¹¹⁵

It is this Court's view, however, that the word "may" in Section 301 has an expansive connotation. In ordinary common parlance, the word "may" as used in the § 301 of the Bankruptcy Code means "might" or is meant to express a "possibility." The debtor . . . [has] the possibility of being a debtor under the Bankruptcy Code, but he had to obtain the credit counseling to be certain.¹¹⁶

This broad definition of the word "may" is not without judicial support,¹¹⁷ and was used by the *Tomco* court to reach its conclusion: Section 301 provides that a bankruptcy case is commenced by an individual

111. 11 U.S.C.A. § 301 (West 2004 & Supp. 2006); *see also id.* §§ 302, 303. Section 301 covers individuals voluntarily filing for bankruptcy; section 302 covers individuals filing jointly for bankruptcy; and section 303 covers involuntary bankruptcies. Because all three sections provide that a bankruptcy case may only be commenced by or against a person "that may be a debtor" under title 11, all three sections can be invoked as textual evidence that § 109(h) is jurisdictional in nature. For simplicity and clarity, this Note focuses on section 301. However, sections 302 and 303 could be used as additional support for this argument.

112. *Id.* § 301(a) (emphasis added).

113. *See infra* Part II.B.2.a.

114. *See infra* Part II.B.2.a.

115. *In re Tomco*, 339 B.R. at 159.

116. *Id.* (citations omitted). *But see In re Hawkins*, 340 B.R. 642, 646 (Bankr. D.D.C. 2006). The *Hawkins* court cleverly used the word "might" to challenge the reasoning of the *Tomco* court. *Id.* ("Congress says in a statute what it means and means in a statute what it says there') However unpalatable or impractical it might be, the court cannot ignore the words in the statute before it to achieve a more desirable result, nor can it mangle the meaning of those words based on what it thinks § 362 *might* imply." (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)) (citations omitted)).

117. *See In re Copper*, 314 B.R. 628, 637 (B.A.P. 6th Cir. 2006) ("Finally, it is also relevant that § 706(a) uses the word 'may' meaning 'might' or 'used to express possibility' or 'used to express opportunity or permission.' If Congress had intended to leave the bankruptcy courts with absolutely no discretion in the matter, it would have used the more mandatory phrase of 'shall be able to convert.' (citing *Random House Unabridged Dictionary* 1189 (2d ed. 1993))).

who *has the potential* to be a debtor under section 109. Thus, allowing an individual who has not received credit counseling to commence a bankruptcy case does not render section 301 illogical because the individual *had the potential* to obtain the counseling.

3. Practical Consequences of Section 109(h) Interpretation

a. *The Automatic Stay and Abuse of the Bankruptcy System*

The automatic stay gives debtors “one of the most powerful weapons known to the law.”¹¹⁸ As discussed above,¹¹⁹ when courts determine that section 109(h) is not jurisdictional, it follows that a petition filed by a debtor who has not received credit counseling nevertheless commences a bankruptcy case that gives rise to the protections of the automatic stay¹²⁰ until the case is dismissed by the court. Thus, an individual who has not obtained credit counseling as directed by Congress can still receive an immediate automatic stay. Courts are therefore “concerned about abuse of the bankruptcy process through serial filings that repeatedly invoke the automatic stay, thus improperly frustrating the rights of secured creditors.”¹²¹ Courts striking (rather than dismissing) petitions filed in violation of 109(h) assert that allowing an individual to commence a case without having satisfied the 109(h) credit counseling requirement would allow that same individual to realize the protections of the automatic stay for an uncertain period of time between the filing of the petition and dismissal of the case by the court.¹²² This situation might promote abuse of the bankruptcy system by encouraging individuals to make serial filings, despite being ineligible for relief under 109(h), solely to invoke the protections of the automatic stay in the face of collection actions by secured creditors.¹²³

In response to this concern, dismissal courts assert that there is a restraint on serial filings built into the Code.¹²⁴ Section 362(c)(3) states that if an individual files a second bankruptcy petition and also had a bankruptcy case pending in the preceding one year period, then the automatic stay in the second case will terminate after thirty days unless the debtor rebuts the presumption that the second filing was made in bad faith.¹²⁵ Because there

118. *In re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988); *see also* H. Comm. on the Judiciary, Bankruptcy Law Revision, H.R. Rep. No. 95-595, at 12 (1977) (“[The automatic stay] is one of the most important protections provided by the bankruptcy laws.”).

119. *See supra* note 103 and accompanying text.

120. *See* 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2006) for a list of debtor protections provided by the automatic stay.

121. *In re Ross*, 338 B.R. 134, 137 (Bankr. N.D. Ga. 2006).

122. *See supra* notes 102-03 and accompanying text.

123. *In re Seaman*, 340 B.R. 698, 708 (Bankr. E.D.N.Y. 2006).

124. *Id.* at 709.

125. 11 U.S.C.A. § 362(c)(3).

is a built-in restraint on serial filers, dismissal courts reject this concern about abuse of the bankruptcy process.

Congress specifically dealt with the effect of serial filings in new §§ 362(c)(3) and (4); it did so without regard to eligibility under either prior or new law. Indeed, when Congress dealt with the interplay of the automatic stay of § 362 (essentially, a question in the first instance of jurisdiction) and eligibility under § 109, it dealt only with § 109(g) in a way that indicates it recognized that the petition of an ineligible debtor nevertheless commences an effective case over which the bankruptcy court has jurisdiction.¹²⁶

A “serial filer” who commences a bankruptcy case without having satisfied the 109(h) credit counseling requirement solely to stall creditors with the protections of the automatic stay is not without consequence. If the “serial filer” files a second bankruptcy petition within the year, there will be a presumption of bad faith, and the automatic stay will terminate after thirty days.¹²⁷

The dismissal courts also reject the argument that the 362(c)(3) bad faith presumption will unfairly punish individuals who fail, through misunderstanding or some other good faith reason, to obtain credit counseling.¹²⁸ For example, an individual whose home is scheduled for foreclosure the next day may file a petition for bankruptcy relief without knowledge of the credit counseling requirement. According to dismissal courts, this individual has commenced a case that must be immediately dismissed for failure to satisfy section 109(h). If the individual then obtains credit counseling and immediately refiles, he or she must overcome the bad-faith presumption under section 362(c)(3) or face termination of the automatic stay after thirty days.¹²⁹

But the *Ross*, *Seaman*, and *Tomco* courts, which take a dismissal approach, were not persuaded that this consequence would adversely affect such an individual who failed to obtain credit counseling in good faith.¹³⁰

[T]he dismissal of a case filed by an ineligible petitioner does not leave a good-faith debtor without recourse. Such debtors may still access the ‘full panoply of protections’ [in a second filing] by seeking an extension of the automatic stay from the court within the first thirty days after the second case is filed. While there is no doubt that this avenue poses significant burdens on debtors or others seeking to continue the automatic stay, it is also apparent that Congress, through this provision, intended

126. *In re Ross*, 338 B.R. at 139.

127. 11 U.S.C.A. § 362(c)(3).

128. *See infra* notes 199-202 and accompanying text.

129. 11 U.S.C.A. § 362(c)(3).

130. *In re Tomco*, 339 B.R. 145, 156, 158 (Bankr. W.D. Pa. 2006) (“Section 362(c)(3) concerns are irrelevant to whether this Court should dismiss [the] bankruptcy case. . . . Had Congress desired to include in Section 362 of the Bankruptcy Code additional exceptions, Congress could have done so. Congress, however, did not do so and this Court will not rewrite the statute.”); *see also In re Seaman*, 340 B.R. 698, 709 (Bankr. E.D.N.Y. 2006); *In re Ross*, 338 B.R. at 139-40.

that in appropriate circumstances, a debtor or other party in interest could move promptly to reinstate the protections of the automatic stay. The reinstatement of the automatic stay, not the remedy of striking the petition, appears to be the answer provided by BAPCPA to the question of how a petitioner who files a bankruptcy case without satisfying the credit counseling requirement may gain access to the full benefits of the bankruptcy system.¹³¹

The *Seaman* court declared that courts should not strike petitions filed in violation of 109(h) in an effort to protect good faith petitioners from the section 362(c)(3) bad faith presumption because Congress gives these petitioners the right to prove to the court that the second filing is in good faith.¹³²

The *Ross* court further noted that courts which seek to protect an ineligible debtor's rights in a second filing by striking the petition as opposed to dismissing the case will often have precisely the opposite effect.¹³³ Striking the petition means that no case is commenced. As the *Ross* court pointed out (and some striking courts agree),¹³⁴ if no case is commenced there is no automatic stay imposed by the filing of the petition, which means creditors can foreclose on secured property.¹³⁵ Therefore, courts seeking to protect petitioners by striking the petition of an individual ineligible under section 109(h) will often cause significant harm. The fact that bankruptcy relief may be limited in a second filing is of little consequence to an individual who failed to obtain credit counseling and had his or her home foreclosed because no automatic stay was imposed after the first inadequate filing.¹³⁶

b. *Uncertainty and the Automatic Stay*

Finally, dismissal courts note that substantial uncertainty and confusion would plague creditors as a result of striking petitions filed in violation of

131. *In re Seaman*, 340 B.R. at 709 (citation omitted).

132. *Id.*; see also *In re Racette*, 343 B.R. 200, 204 (Bankr. E.D. Wis. 2006) (“[B]eing required to file a motion to seek to continue the stay under § 362(c)(3) in their new case may be an appropriate price to pay for the Debtors’ apparent carelessness in reviewing their bankruptcy petition . . .”).

133. *In re Ross* 338 B.R. at 139-40 (“To be sure, dismissing the case as void *ab initio* keeps the case from counting as a prior pending case for purposes of § 362(c)’s limitations on stays in successive cases. But such ‘protection’ will be a pyrrhic victory if, in the meantime, a creditor has completed a repossession or foreclosure because of the absence of a stay in the void case. Although courts might hope that creditors will wait for a judicial determination of ineligibility before exercising their remedies, a creditor may decide to rely on its own review of the record concerning eligibility or, more likely, may have completed a foreclosure without knowledge that the bankruptcy case was filed. If an ineligible debtor’s case is void *ab initio*, a debtor in such circumstances will have no protection at all with regard to foreclosed assets in a later case.” (citations omitted)).

134. See *infra* notes 187-94 and accompanying text.

135. See *In re Ross*, 338 B.R. at 138-39.

136. See *id.*

109(h), as opposed to dismissing the case.¹³⁷ As discussed above, under the striking method there would be no automatic stay protection following the filing of a petition by a debtor who has not received credit counseling.¹³⁸ But courts will not immediately strike an inadequate petition the moment it is filed with the clerk. Until the court determines that the individual is ineligible and strikes the petition, creditors will not know whether the individual is protected by the automatic stay.¹³⁹ This uncertainty will extend to questions of “validity of an action against property taken by a creditor of a petitioner who appears ineligible to be a debtor but later is determined to be eligible.”¹⁴⁰ In short, the striking of an ineligible petition leads to a host of “uncertainty” problems for creditors and other parties in interest.¹⁴¹ Striking petitions would force courts to constantly address the validity of creditor and debtor actions taken after the filing of the petition but before a determination of eligibility.¹⁴² By reading section 109(h) as non-jurisdictional, on the other hand, dismissal courts permit a debtor who has not obtained credit counseling to commence a bankruptcy case and invoke the automatic stay. Thus, both the debtor and the creditors can be certain that the automatic stay is in effect when an individual files a bankruptcy petition, regardless of whether the individual has satisfied the 109(h) credit counseling requirement.¹⁴³ If the court determines that the individual is ineligible under 109(h), the court will dismiss the case and the automatic stay will be lifted. For this reason, dismissal courts assert that reading 109(h) as non-jurisdictional is the best reading of the statute because certainty is provided to both debtors and creditors.

B. A Bankruptcy Petition Filed in Violation of 109(h) Does Not Commence a “Case” and the Proper Remedy Is to Strike the Petition

Rather than dismissing the bankruptcy case of an individual ineligible for bankruptcy under section 109(h), a number of courts (“striking courts”) hold that the proper remedy is to strike the petition.¹⁴⁴ While these courts disagree on whether to label section 109(h) as jurisdictional in nature,¹⁴⁵

137. See *id.* at 140; see also *In re Racette*, 343 B.R. at 203; *In re Seaman*, 340 B.R. at 707; *In re Tomco*, 339 B.R. 145, 159 (Bankr. W.D. Pa. 2006).

138. See *supra* note 134; see also *infra* notes 192-99 and accompanying text.

139. *In re Ross*, 338 B.R. at 140.

140. *In re Seaman*, 340 B.R. at 707.

141. *Id.*

142. *Id.*

143. *Id.* at 707-08.

144. See, e.g., *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006); *In re Thompson*, 344 B.R. 899 (Bankr. S.D. Ind. 2006); *In re Carey*, 341 B.R. 798 (Bankr. M.D. Fla. 2006); *In re Salazar*, 339 B.R. 622 (Bankr. S.D. Tex. 2006); *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005); *In re Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005); *In re Valdez*, 335 B.R. 801 (Bankr. S.D. Fla. 2005); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005).

145. For example, in *In re Valdez*, the court stated that it “views the criteria established by 11 U.S.C. § 109 as jurisdictional.” 335 B.R. at 803. However, other striking courts do not view the failure to obtain credit counseling in accordance with section 109(h) as a definitive jurisdictional bar to bankruptcy relief. As one striking court has noted, “Every federal court

they all agree that the failure to satisfy the 109(h) credit counseling requirement means that no case is commenced, which means that there is no case to dismiss, and the petition must be stricken.

1. Prior Interpretations of the Bankruptcy Code

a. Pre-BAPCPA Jurisprudence with Regard Section 109(g)

The *In re Salazar* court addressed the contention that pre-BAPCPA interpretations of section 109(g) require a determination that the 109(h) credit counseling provision is non-jurisdictional in nature.¹⁴⁶ While noting that the *In re Flores* court read section 109(g) as non-jurisdictional,¹⁴⁷ the *Salazar* court observed that other courts disagree.¹⁴⁸ This conflict in pre-BAPCPA 109(g) jurisprudence led the *Salazar* court to conclude that “regardless of one’s view on § 109(h), § 109(g)’s treatment in case law cannot be entirely instructive.”¹⁴⁹

necessarily has the jurisdiction to determine whether it has subject matter jurisdiction over the case or controversy before it.” *In re Hawkins*, 340 B.R. 642, 646 (Bankr. D.D.C. 2006). Another striking court, the *Elmendorf* court, emphasized the distinction between viewing Section 109(h) as a jurisdictional bar to bankruptcy and viewing 109(h) as an eligibility requirement which determines whether a case is commenced:

The Court interprets [28 U.S.C.] § 1334(a) to encompass cases filed and pending before the Court even if not properly commenced by the filing—that is, cases initiated by potentially ineligible debtors—until such time as the Court is able to determine its jurisdiction over those filings. On the other hand, a case under title 11 isn’t commenced until a petition is filed by a party *eligible* to be a debtor.

In re Elmendorf, 345 B.R. at 499. By applying this interpretation to 28 U.S.C. § 1334(a), the *Elmendorf* court effectively negated the jurisdictional argument set forth in *In re Tomco*, 339 B.R. 145, 159 (Bankr. W.D. Pa. 2006). See *supra* Part II.A.2.a. Contrary to the *Elmendorf* court, the *Hawkins* court reads a narrower interpretation of 28 U.S.C. § 1334 to assert that Section 109(h) is jurisdictional:

A title 11 case must commence for a court to assert jurisdiction under § 1334. . . . [Section] 301 of the Bankruptcy Code sets forth the only basis for commencing a case under title 11. . . . an individual who fails to obtain pre-petition credit counseling of the kind described in § 109(h) ‘may not be a debtor under this title.’ *Ergo*, a petition filed by an individual who has failed to obtain pre-petition credit counseling does not ‘commence[]’ a title 11 case, which means that there is no case conferring subject matter jurisdiction on the district court or on the bankruptcy court through a referral of jurisdiction pursuant to 28 U.S.C. § 157.

In re Hawkins, 340 B.R. at 645 (citing 11 U.S.C.A. § 109(h) (West 2004 & Supp. 2006)).

146. *In re Salazar*, 339 B.R. at 631-32. For a discussion of the argument that pre-BAPCPA jurisprudence with regards to Section 109(g) demands a reading that section 109(h) is jurisdictional, see *supra* Part II.A.1.a.

147. *In re Flores*, 291 B.R. 44 (Bankr. S.D.N.Y. 2003); see also *supra* notes 75-80 and accompanying text.

148. *In re Salazar*, 339 B.R. at 631 (citing *In re McKay*, 268 B.R. 908, 912 (Bankr. W.D. Va. 2001)); *In re Pelletier*, No. 00-81949 C-13, 2000 WL 33673780 (Bankr. M.D.N.C. Sept. 7, 2000); *In re Hollberg*, 208 B.R. 755, 756 (Bankr. D.D.C. 1997); *In re Prud’Homme*, 161 B.R. 747, 751 (Bankr. E.D.N.Y. 1993); *In re Walker*, 171 B.R. 197, 202 (Bankr. E.D. Pa. 1994); *In re Miller*, 143 B.R. 815, 820 (Bankr. W.D. Pa. 1992).

149. *In re Salazar*, 339 B.R. at 632.

Furthermore, the *In re Thompson* court pointed out that prior to the enactment of the new section 362(c)(3) bad faith presumption in BAPCPA, it made little difference whether the petition of an individual ineligible for relief under section 109(g) was dismissed or stricken.¹⁵⁰ Prior to the new 362(c)(3) provision, the termination of a case did not affect an individual's ability to trigger the full advantages of the automatic stay in a subsequent case.¹⁵¹ Indeed, whether a case was dismissed or stricken under pre-BAPCPA section 109(g) was a "difference without a distinction."¹⁵² For this reason, the *Thompson* court cautioned against using section 109(g) case law as an interpretive guide to section 109(h) because "with [BAPCPA's] addition of § 362(c)(3) . . . a distinction exists."¹⁵³

2. Plain Reading of the Statute

a. Section 301

The courts that determine to strike (rather than dismiss) petitions filed in violation of section 109(h) unanimously draw their textual evidence from section 301.¹⁵⁴ Section 301 states that a case "is commenced by the filing with the bankruptcy court of a petition . . . by an entity that may be a debtor under such chapter."¹⁵⁵ The *Thompson* court stated that "[t]he phrase 'an entity that may be a debtor' . . . qualifies 'petition' and that only those petitions filed by those eligible to be debtors 'under such chapter' can 'commence' a 'case.'"¹⁵⁶ In order to determine "those debtors eligible to be debtors," one must look to section 109, which is entitled "Who may be a

150. *In re Thompson*, 344 B.R. 899, 904 (Bankr. S.D. Ind. 2006); see also *In re Salazar*, 339 B.R. at 633.

151. See 11 U.S.C.A. § 362(c)(3) (West 2004 & Supp. 2006); see also *supra* notes 61-64 and accompanying text.

152. *In re Salazar*, 339 B.R. at 633.

153. *In re Thompson*, 344 B.R. at 904. The *Thompson* court also noted other situations that lead to striking rather than dismissal:

[T]his court has interpreted other rules which has led to the "striking" of a complaint rather than the dismissal of a case. [The local District Court rules provide] that "[a] civil action is commenced by filing a complaint with the court." When this Court determines that an attorney not admitted to practice before the courts of this District has filed a complaint to "commence" a civil action, this Court strikes the complaint because the attorney is ineligible to "commence" a case in this District.

Id. at 905.

154. See, e.g., *In re Elmendorf*, 345 B.R. 486, 495-99, 501-02 (Bankr. S.D.N.Y. 2006); *In re Thompson*, 344 B.R. at 905; *In re Carey*, 341 B.R. 798, 804 (Bankr. M.D. Fla. 2006); *In re Salazar*, 339 B.R. at 625-26; *In re Hubbard*, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005). For simplicity and clarity, this Note focuses on section 301. However, sections 302 and 303 could be used as additional support for this argument. See *supra* notes 111-16 and accompanying text.

155. 11 U.S.C.A. § 301; see also *id.* §§ 302-03.

156. *In re Thompson*, 344 B.R. at 905 (quoting 11 U.S.C.A. § 301). "Here, [the court's] reading of §§ 301 and 302 leads [it] to conclude that the 'filing of a petition' is not synonymous with 'the commencement of a case.'"*Id.*

debtor.”¹⁵⁷ Section 109 requires an individual to receive credit counseling in order to be an eligible debtor.¹⁵⁸ If someone files a petition without satisfying section 109(h), he or she is not eligible to be a debtor and, according to a plain reading of section 301, no case is commenced.¹⁵⁹ Allowing individuals who fail to qualify as an “eligible debtor” to nonetheless commence a bankruptcy case “renders a straightforward reading of Sections 109(h), 301, 302, 303 and 362(a) irrational.”¹⁶⁰

b. Section 707

Section 707 of BAPCPA outlines circumstances under which a court may dismiss an individual consumer bankruptcy case.¹⁶¹ The failure to seek credit counseling as required under section 109(h) is noticeably absent from the list. In *In re Rios*, the court relied on this absence as evidence that Congress did not intend the petitions of debtors ineligible under section 109(h) to commence a case.¹⁶²

The Court thinks that dismissal [of a case] for failure to seek credit counseling achieves a result Congress intended to avoid; that is, future limitation of debtor protection under the BAPCPA. Indeed, Congress could have made failure to seek credit-counseling cause for dismissal under the revised 11 U.S.C. § 707, but did not. In enacting § 109(h)(1), Congress sought to enlarge debtors’ options in the face of financial difficulty, not limit them. Congress intended that debtors would inform themselves of their options *prior* to bankruptcy filing by participating in credit counseling, and if bankruptcy continued to be the best option, debtors could avail themselves of that alternative. It is therefore apparent that Congress did not intend the credit-counseling requirement to limit the

157. 11 U.S.C.A. § 109.

158. *Id.* § 109(h).

159. *In re Salazar*, 339 B.R. at 625-26; *see also* Robert Lefkowitz, *The Filing of a Bankruptcy Petition in Violation of 11 U.S.C. § 109(g): Does it Invoke the Automatic Stay?*, 26 Cardozo L. Rev. 297, 315 (2004) (“Only entities who meet the eligibility requirements of § 109 may ‘commence’ a case. An entity that does not meet the requirements of § 109 may not be a debtor and thus cannot ‘commence’ a case. Any document labeled ‘petition’ filed by such an entity does not constitute a ‘petition’ as defined by the Bankruptcy Code. . . . Therefore, the court prevents [the petitioner] from commencing the case . . .”).

160. *In re Elmendorf*, 345 B.R. at 501; *see also* *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (“[T]he cardinal rule [is] that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.”); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“Absent a clearly expressed legislative intention to the contrary, [statutory language] must ordinarily be regarded as conclusive.”); *United States v. Hartwell*, 73 U.S. 385, 396 (1867) (“The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.”).

161. 11 U.S.C.A. § 707.

162. *In re Rios*, 336 B.R. 177, 180 (Bankr. S.D.N.Y. 2005).

availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate. . . . [T]he bankruptcy case was never properly commenced and is therefore stricken.¹⁶³

The *Rios* court effectively extended section 707 from mere textual support for the conclusion that an individual who has not obtained credit counseling cannot commence a case, to evidence of a purposeful, congressional intent to avoid such an interpretation.

c. *Section 521*

The striking courts also cite section 521¹⁶⁴ of BAPCPA for evidence that the filing of an ineligible petition should not result in dismissal of a case.¹⁶⁵ Section 521 includes a list of documents that a debtor must file with the court¹⁶⁶ as well as matters that would render a case so deficient that it would be "automatically dismissed."¹⁶⁷ Although the debtor is required to file a certificate of credit counseling under section 521(b)(1),¹⁶⁸ failure to file this certificate is not itself listed as a basis for automatic dismissal of the case.¹⁶⁹ The *Salazar* court concluded that "[s]ince failure to obtain credit counseling is not a basis for dismissal, the only alternative is to find that no case was commenced by the filing of a petition by an ineligible person."¹⁷⁰

d. *The Surplusage Argument: Section 362(b)(21)(A)*

The striking courts address the "surplusage" argument raised by the dismissal courts under section 362(b)(21)(A).¹⁷¹ The "surplusage" argument notes that section 362(b)(21)(A), which denies the automatic stay to debtors ineligible under section 109(g), does not expressly deny the protection to individuals ineligible under other sub-provisions of section 109. The dismissal courts infer that individuals ineligible under section 109(h) are protected by the automatic stay, and that a case therefore must

163. *Id.*

164. 11 U.S.C.A. § 521.

165. *In re Elmendorf*, 345 B.R. at 502; *In re Salazar*, 339 B.R. at 630.

166. 11 U.S.C.A. § 521.

167. *Id.* § 521(i).

168. *Id.* § 521(b)(1).

169. The failure to submit a credit counseling certificate as required under § 521(b)(1) is not listed as a cause for automatic dismissal under § 521(i). See *id.* §§ 521(b)(1), (i).

170. *In re Salazar*, 339 B.R. at 630; see *In re Elmendorf*, 345 B.R. at 502 ("Congress could have, but did not, include a credit counseling certificate as among those documents to be filed pursuant to 11 U.S.C. § 521(a) by debtor to avoid *automatic* dismissal pursuant to § 521(i)(1)."); see also *In re Thompson*, 344 B.R. 899, 903 (Bankr. S.D. Ind. 2006) ("By placing the credit counseling requirements under § 109 (the 'who can be a debtor' section) rather than § 521 (the 'Debtor's duties' section, enumerating the documents required to be filed and the actions required to be taken by the debtor), debtors now have an *immediate eligibility* threshold to cross.").

171. See *supra* Part II.A.2.c.

commence despite failure to receive credit counseling.¹⁷² Dismissal courts contend that any other interpretation would render the statute superfluous.¹⁷³

The *Elmendorf* court rejected the “surplusage” argument by insisting that section 362(b)(21)(A) applies uniquely to section 109(g). The court noted that where “ineligibility is incurable, no stay is created by the bankruptcy filing,”¹⁷⁴ and then observed that ineligibility under section 109(g) can be cured by a “showing of changed circumstances or other good cause.”¹⁷⁵ Because 109(g) ineligibility can be cured, the court would exercise jurisdiction over the matter until section 109(g) eligibility can be established,¹⁷⁶ and the automatic stay would apply during this time. The *Elmendorf* court concluded that the purpose of section 362(b)(21)(A) is to deny the automatic stay under certain circumstances arising under section 109(g).¹⁷⁷ Section 109(h) ineligibility, on the other hand, is incurable.¹⁷⁸ Because it is incurable, there is no time gap between the filing of a petition and the fundamental fact of ineligibility; an individual is either eligible under section 109(h) when they file, or they are not.¹⁷⁹ Because there is no time gap, the automatic stay does not come into effect and there is no need to create an exception to the automatic stay with regard to section 109(h).¹⁸⁰ Thus, section 362(b)(21)(A) is not left superfluous by this interpretation. Finding that a petition filed in violation of 109(h) does not commence a case does not render the 362(b)(21)(A) provision a nullity.¹⁸¹

The *Salazar* court also avoided the section 362(b)(21)(A) “superfluous” pitfall, but took a slightly different path. The court reflected on the relationship between case law and the legislative process to conclude that

172. See *supra* note 103 and accompanying text. For a holding that the automatic stay can be invoked even when no case is commenced, see *In re Thompson*, 344 B.R. 899; *In re Hawkins*, 340 B.R. 642, 645 (Bankr. D.D.C. 2006) (“[T]here is nothing in § 362 as amended by Congress that contradicts directly the plain language of 28 U.S.C. § 1334 and § 301 of the Bankruptcy Code, which set forth the statutory framework for the district court’s jurisdiction over bankruptcy cases.”); *infra* notes 212-15 and accompanying text.

173. See *supra* notes 107-10 and accompanying text.

174. *In re Elmendorf*, 345 B.R. at 499.

175. *Id.*

176. *Id.* at 499-500.

177. *Id.* at 499.

178. *Id.* at 500 (“Congress intended for debtors to seek credit counseling *prior* to filing for bankruptcy relief, so that bankruptcy may be avoided altogether if possible, through, for example, an alternate debt repayment plan.”).

179. *Id.* “Thus, the non-compliant individual who does not obtain credit counseling is ineligible to enjoy the benefits of the Bankruptcy Code. Credit counseling is an absolute pre-requisite to individual bankruptcy eligibility.” *Id.* at 495.

180. *Id.* at 500.

181. *Id.* “Congress obviously intended Section 109(h) ineligibility to have a preclusive effect; there was no need to provide an exception to the automatic stay for ineligible individuals by virtue of § 109(h) because no case is commenced by a bankruptcy filing in that regard; and no stay invoked thereby.” *Id.* at 502. But see *In re Wallert*, 332 B.R. 884 (Bankr. D. Minn. 2005). The *Wallert* court agreed that the 109(h) eligibility requirement is an incurable defect in a petition, but unlike the *Elmendorf* court, uses this incurability as support for dismissing a case. *Id.* at 888.

Congress adopted 362(b)(21)(A) with the intent legislatively to override courts that were misapplying section 109(g).¹⁸² The court observed that, prior to BAPCPA, some courts had concluded that filings in violation of 109(g) did not commence a case, while others had found that such filings invoked the automatic stay which remains in place until a judicial determination of 109(g) eligibility.¹⁸³ For this reason, “the apparent legislative intent [of 362(b)(21)(A)] was to overrule court decisions that were at odds with the statute as previously drafted. Accordingly, section 362(b)(21) was not surplusage—it implemented a legislative intent to eliminate any court-perceived ambiguity.”¹⁸⁴ Section 362(b)(21)(A) is intended to address 109(g) without regard to any other sub-provisions of section 109.¹⁸⁵ The *Salazar* court reinforced this argument by stating that “even if the language were treated as surplusage, the Court should not give meaning to surplusage if doing so would be demonstrably at odds with legislative intent.”¹⁸⁶

3. Practical Consequences of Section 109(h) Interpretation

a. *The Automatic Stay and Abuse of the Bankruptcy System*

Unlike dismissal courts, the *Elmendorf* court held that a petition filed in violation of 109(h) does not invoke the automatic stay.¹⁸⁷ This conclusion was based on a “straightforward reading”¹⁸⁸ of section 362(a).¹⁸⁹ The court’s reasoning hinged on the following argument: Section 362(a) imposes the automatic stay when “a petition [is] filed under section 301.”¹⁹⁰ Section 301 refers to the filing of a petition by an individual “that may be a

182. *In re Salazar*, 339 B.R. 622, 632 (Bankr. S.D. Tex. 2006).

183. *Id.* at 631-32.

184. *Id.* at 632.

185. *See id.*; *see also In re Hawkins*, 340 B.R. 642, 645 (Bankr. D.D.C. 2006) (“There are many reasons why Congress might have amended § 362 in the way that it did. Congress may have focused on § 109(g) because courts were split with respect to the effect of that specific sub-part of the statute at the time of the congressional amendment. In other words, it may be the case that § 109(g)—and only § 109(g)—was on Congress’ mind when it revised § 362. It is therefore no mystery why Congress would amend § 362 to refer to § 109(g) specifically rather than to § 109 as a whole.”).

186. *In re Salazar*, 339 B.R. at 632 (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004)). *But see U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

187. *In re Elmendorf*, 345 B.R. 486, 498 (Bankr. S.D.N.Y. 2006). *But see supra* notes 102-03 and accompanying text.

188. *In re Elmendorf*, 345 B.R. at 498 (citing *Lamie*, 540 U.S. at 534 (“[W]hen a statute’s language is plain, the sole function of the courts is to enforce it according to its terms, at least where the disposition required by the text is not absurd, even if the statute is phrased awkwardly or ungrammatically.”)).

189. 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2006).

190. *Id.* § 362(a).

debtor.”¹⁹¹ An individual that “may be a debtor” must have satisfied the 109(h) credit counseling requirement.¹⁹² Thus, “[s]ections 109(h), 301, 302, and 362(a), which when read to [sic] together . . . lead to the logical result that the filing of a petition without first obtaining a credit briefing as required by 11 U.S.C. § 109(h) renders a debtor ineligible for bankruptcy relief and does not trigger the protections of the automatic stay.”¹⁹³ To hold otherwise, the court contended, would be wholly at odds with the congressional intent of BAPCPA.¹⁹⁴

The *Elmendorf* court further asserted that dismissal courts will promote abuse of the bankruptcy system by allowing a debtor ineligible under 109(h) to enjoy the protections of the automatic stay.¹⁹⁵ Individuals with no intention of reorganizing could temporarily invoke the protections of the automatic stay to forestall secured creditors and delay matters, at least until a court determines that they are ineligible.¹⁹⁶ These individuals could file at the last minute without credit counseling and then “sit back and do virtually nothing, secure in the knowledge that creditors may not proceed until dismissal . . . enjoying the delay that such action will involve.”¹⁹⁷ The idea of ineligible debtors maintaining such easy access to the automatic stay prompted the *Salazar* court to state that “[i]t is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy’s most powerful protection.”¹⁹⁸ Allowing an individual who has not obtained credit counseling to commence a case is intolerable as it would allow abusive debtors to access the automatic stay.

b. *The Penalty: Section 362(c)(3)*

The striking courts note that striking the petition of a debtor who has not received credit counseling, as opposed to dismissing the case, also avoids the consequence of section 362(c)(3).¹⁹⁹ Section 362(c)(3) provides that the second filing by an individual within one year of a pending bankruptcy case is presumed to be in bad faith so that the automatic stay in the second filing will terminate after thirty days unless the individual can rebut the bad faith presumption.²⁰⁰ Given this limitation on future bankruptcy relief, courts are concerned about the honest and ignorant person who files for

191. *Id.* § 301.

192. *Id.* § 109(h).

193. *In re Elmendorf*, 345 B.R. at 501.

194. *Id.* at 501-02 (“The Court will not discount obvious Congressional intent in enacting Section 109(h)—that incurably ineligible debtors [under section 109(h)] not be permitted to enjoy the protections of the automatic stay.”).

195. *Id.* at 500-01, 504.

196. *Id.* at 501.

197. *Id.* at 504.

198. *In re Salazar*, 339 B.R. 622, 624 (Bankr. S.D. Tex. 2006) (emphasis omitted).

199. 11 U.S.C.A. § 362(c)(3) (West 2004 & Supp. 2006); see also *supra* notes 62-64 and accompanying text.

200. 11 U.S.C.A. § 362(c)(3).

desperately needed bankruptcy relief without first obtaining credit counseling.²⁰¹ These petitioners often file as a result of serious or fatal illness, the loss of a job, or divorce.²⁰² This concern prompted the *Rios* court to declare that “Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors [who fail to obtain credit counseling], which dismissal would accomplish, and thus, dismissal is inappropriate.”²⁰³

c. Uncertainty and the Automatic Stay

Striking courts holding that petitions filed in violation of 109(h) do not give rise to the automatic stay recognize that an element of uncertainty is infused into the bankruptcy process.²⁰⁴ Because the petition will not be immediately stricken when filed with the clerk, there is a period of uncertainty between the filing of the petition and a judicial determination of

201. Professor Susan Block-Lieb has questioned whether a “debtor protection” such as the 109(h) credit counseling provision as labeled by Congress, with harsh penalties, such as the 362(c)(3) bad faith presumption in a second filing, is in fact a veiled debtor punishment. See Susan Block-Lieb, *Mandatory Protections as Veiled Punishments: Debtor Education in H.R. 975, The Bankruptcy Abuse and Consumer Protection Act of 2003*, 69 Brook. L. Rev. 425, 427 (2004).

202. See *supra* note 39 and accompanying text; see also *In re Elmendorf*, 345 B.R. at 494; *In re Valdez*, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005) (“Is it the intent of Congress that poor, ignorant persons who do not know the law and cannot afford to obtain the advice of counsel are to be denied protection and assistance of the Bankruptcy Code which is available to more affluent and better educated persons? Or, is it the intent of Congress that decent, honest, hardworking persons, who have suffered financial misfortune or tragedy, be educated by budget and credit counseling services to help them determine if there is a more appropriate way to deal with their financial problems? Sadly, the language in the Code does not clearly reveal Congress’ intent; either the Code language was inartfully drafted or the congressional intent was indeed the former less compassionate, harsher result, rather than the latter.”).

203. *In re Rios*, 336 B.R. 177, 180 (Bankr. S.D.N.Y. 2005). But see *In re Salazar*, 339 B.R. at 626 (“[T]here is no room for an equitable exception to the application of the statute.”); *In re Tomco*, 339 B.R. 145, 152 (Bankr. W.D. Pa. 2006). The *Tomco* court, concluding that petitions filed in violation of 109(h) commence a case and should be dismissed, did not ignore the good faith debtor in reaching its decision:

This Court, as well as others, recognize that consumer debtors facing eviction or mortgage foreclosure are not meeting with lawyers trying to figure out what to do well in advance before they file for bankruptcy relief. . . . The debtor usually is either pounding the pavement in an attempt to refinance existing debt so that monthly payments can be made more affordable [T]he average consumer debtor devotes most of his or her time and effort attempting to accumulate the needed funds to become current with creditors. As the consumer is in dire financial straits, the debtor has little or no disposable income for counsel because the debtor is using what little funds he or she has to pay for family expenses such as housing, utilities, groceries, and clothing.

Id. But the court noted that the proper remedy for such good faith and unfortunate debtors was not to have their petitions stricken, but to file a certificate of exigent circumstances as required by section 109(g). *Id.* at 153; see also *supra* notes 23-24 and accompanying text.

204. *In re Salazar*, 339 B.R. at 627 (citing *In re Ross*, 338 B.R. 134, 140-41 (Bankr. N.D. Ga. 2006)).

eligibility.²⁰⁵ Creditors who move to collect on secured collateral during this ambiguous period may face repercussions if it is later determined that the petitioner is in fact eligible and thus was protected from collection actions through the automatic stay after filing the petition.²⁰⁶ As noted, dismissal courts cite this uncertainty as support for allowing ineligible petitioners to commence a case so that all parties can be certain that the automatic stay is in effect.²⁰⁷ But the *Salazar* court recognized the potential confusion and concluded that “the Court is unaware of any reason that precludes Congress from creating a level of uncertainty pending a final determination by the Court.”²⁰⁸ Indeed, there are a number of examples where actions are subject to substantial uncertainty until a final decision is reached.²⁰⁹ The *Salazar* court continued to articulate its skepticism of the uncertainty argument:

Such a proliferation of exceptions to the automatic stay further indicates Congressional intent to promote specific policies

In other words, the Court sees no reason why certainty must trump policy. Congress has decided to establish new eligibility requirements under BAPCPA. If this Court were to determine that certainty overrides that intent, the Court would be reaching a decision that Congress was not free to change the paradigms under which bankruptcy law operates. The Court declines to make such a decision. Certainty versus policy is a decision that balances social policy with economics. A decision with respect to such matters is left to Congress alone.²¹⁰

205. Creditors could conceivably undertake their own investigations of petitioners to determine if an individual had satisfied the credit counseling requirement. However, this would seem to be a costly and inefficient tool for minimizing the risk of violating the automatic stay.

206. *In re Salazar*, 339 B.R. at 626-27.

207. *See supra* Part II.A.3.b. *But see In re Hawkins*, 340 B.R. 642, 646 n.7 (Bankr. D.D.C. 2006) (“Numerous courts that have declared § 109 to be ‘non-jurisdictional’ have mentioned the supposedly inequitable and impractical results that will obtain if debtor eligibility is treated as a prerequisite to subject matter jurisdiction. These courts make very good arguments for why district and bankruptcy courts *should* be able to assert subject matter jurisdiction even when the purported debtor is ineligible under § 109, but they are irrelevant in deciding whether the court actually *has* jurisdiction in such circumstances under the Bankruptcy Code as it is currently written. The court cannot simply will itself to have whatever jurisdiction it thinks is appropriate to carry out its functions; the source of its jurisdiction comes from Congress and from Congress alone.” (citations omitted)).

208. *In re Salazar*, 339 B.R. at 627.

209. *Id.* at 627-28 (citing *Bernal v. Chavez*, 198 S.W.3d 15 (Tex. App. 2006) (holding that title to real estate may be subsumed by adverse possession)); *see also* 11 U.S.C.A. § 547(b) (West 2004 & Supp. 2006) (governing preferences and fraudulent transfers); *U.S. v. McDermott*, 507 U.S. 447 (1993) (holding that the federal government may claim an unrecorded, inchoate tax lien on acquired property for unpaid federal income taxes); *In re Gandy*, 327 B.R. 796 (Bankr. S.D. Tex. 2005) (holding that the automatic stay is not applicable to actions by a governmental unit to enforce its police powers, but the decision on the applicability of the stay may require judicial determination).

210. *In re Salazar*, 339 B.R. at 628-29; *see also Mansell v. Mansell*, 490 U.S. 581, 594 (1989) (“Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice.”); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)

Thus, the *Salazar* court dismissed the uncertainty argument by pointing its finger at Congress. However, the *Salazar* court also invoked the idea of uncertainty as support for the striking method by warning of the dangers that could result from misunderstandings about an individual's bankruptcy petition.²¹¹

The *Thompson* court avoided the uncertainty dilemma by actually imposing the automatic stay until the court strikes the petition filed in violation of 109(h). The court's primary reasoning for this argument was that the "'commencement' of the case is [not] the exclusive prerequisite for the imposition of the automatic stay."²¹² The court looked to section 362(a) of the Code which provides, "a petition filed under section 301 . . . operates as a stay"²¹³ and noted that section 301 "allow[s] for petitions to be filed by ineligible debtors, they just don't allow *cases to be commenced* by petitions filed by ineligible debtors."²¹⁴ Thus, the event triggering the automatic stay is the filing of a petition, not the commencement of a case; whether an ineligible petition is stricken or dismissed is irrelevant for purposes of the automatic stay.²¹⁵ Under this theory, there will be minimal confusion when a petition is filed because creditors can be certain their interests are protected by the automatic stay even if the individual did not receive credit counseling and their petition is later stricken. By imposing the automatic stay *and* striking petitions filed in violation of 109(h), the *Thompson* court effectively resolved the uncertainty concerns advanced by the dismissal courts.²¹⁶

("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . .").

211. *In re Salazar*, 339 B.R. at 632 n.5 ("The clerk, of course, accepts papers that are presented without a merits review. [Allowing a debtor who fails to obtain credit counseling to commence a case] would allow an individual to title any piece of paper a 'petition' and to give it the same legal significance as one filed in accordance with [the Code]. To accept that argument is to invite havoc. What if the document was filed fraudulently? What if the text of the document indicated that the 'petition' was a 'petition for a grievance' against some unjust act by the government, mistakenly filed with the bankruptcy clerk? . . . To attribute legal significance to misnomered documents (i.e., those filed *not* by someone eligible to be a debtor) is to remove the meaning of the statute.").

212. *In re Thompson*, 344 B.R. 899, 906 (Bankr. S.D. Ind. 2006).

213. 11 U.S.C. § 362(a) (2000).

214. *In re Thompson*, 344 B.R. at 906.

215. *Id.*; see also Posting of David L. Rosendorf to ABI's BAPCPA Blog, http://bapcpa.blogspot.com/2006_04_01_bapcpa_archive.html, You Say Strike It, I Say Dismiss It—What Happens When an Ineligible Debtor Files (Apr. 18, 2006, 05:50 EST).

216. See *supra* Part II.A.3.b. The *Thompson* court further strengthened its conclusion that striking ineligible petitions and imposing the automatic stay are not mutually exclusive by looking, as so many other courts do in a section 109(h) analysis, to the new 362(b)(21)(A) provision. The court agreed that section 362(b)(21)(A) must be read to conclude that petitions filed in violation of 109(h) give rise to the automatic stay. *In re Thompson*, 344 B.R. at 907. The court stated,

This amendment recognizes the different treatment to be afforded a debtor ineligible under § 109(g), who, by definition is, a repeat filer, and a debtor ineligible under § 109(h), whose ineligibility was caused by the failure to perform the ministerial act of obtaining credit counseling. This Court has found that the vast majority of debtors who are ineligible under § 109(h) are pro se debtors who

C. A Third Way?

While the majority of courts remain committed to either striking petitions or dismissing cases, the *Elmendorf* court, which struck a petition filed in violation of 109(h), added a slightly different alternative.²¹⁷ Acknowledging the potential abuse and confusion that could result from striking petitions,²¹⁸ *Elmendorf* concluded that in addition to simply striking ineligible petitions, the court may also strike petitions *with a prejudice to future filings*.²¹⁹

In *Elmendorf*, the court was presented with three individuals who failed to satisfy the 109(h) credit counseling requirement.²²⁰ Besides failing to obtain credit counseling, however, the individuals had little in common. The first petitioner, Lena Elmendorf, had never before filed for bankruptcy and had relied on counsel to file her case.²²¹ The second petitioner, Diana Finlay, had previously engaged in a series of bankruptcy filings in an attempt to forestall secured creditors from exercising collection rights.²²² The third petitioner, Shayna Zanel, was the wife of a man who had repeatedly filed to forestall a secured creditor's foreclosure on real property—and was now apparently filing for the same reason.²²³ This situation prompted the court to state that “[g]iven their particular circumstances . . . [t]he appropriate outcome, if requested, is to allow these debtors to be treated differently in accordance with their circumstances”²²⁴ The court determined that, depending on the factors surrounding each petitioner, it could either strike petitions, which *would not* limit the benefits available in a future bankruptcy filing,²²⁵ or strike the petition with prejudice to future filings, which *would* limit future bankruptcy benefits.²²⁶ The court based this solution on section 105(a) of BAPCPA²²⁷ and judicial docket management powers.

Section 105(a) provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from . . . taking any action or making any determination necessary . . . to prevent an abuse of process.”²²⁸ The *Elmendorf* court viewed this provision

are neither serial filers nor aware that they must seek or attempt to seek credit counseling before they file.

Id. at 907 n.14; *see also supra* Part II.A.2.c.

217. *In re Elmendorf*, 345 B.R. 486, 504 (Bankr. S.D.N.Y. 2006).

218. *See supra* Part II.B.3.c.

219. *In re Elmendorf*, 345 B.R. at 504.

220. *Id.* at 491-93.

221. *Id.* at 491.

222. *Id.* at 492.

223. *Id.* at 492-93.

224. *Id.* at 493-94.

225. *See* 11 U.S.C.A. § 362(c)(3) (West 2004 & Supp. 2006).

226. *In re Elmendorf*, 345 B.R. at 504.

227. *See id.* at 503-04; *see also* 11 U.S.C.A. § 105(a).

228. 11 U.S.C.A. § 105(a).

as evidence that, although a court should strike petitions, it has the power to fashion a remedy that will preclude abusive debtors, such as Diana Finlay, from future bankruptcy relief.²²⁹ When this power was challenged by the U.S. Trustee because the striking of a petition is not explicitly provided for in BAPCPA, the court relied on its docket management powers.²³⁰ "The action of striking a [petition] is an administrative function engaged in as a docket management tool. The Court has an inherent right to manage its case docket."²³¹

Thus, prior to striking a petition filed in violation of 109(h), the *Elmendorf* court stated that courts should determine if abuse is present, and if so, strike the petition with prejudice to future filings. This determination is based on several factors, which may include

the number of previous bankruptcy filings; whether the previous filings were dismissed/stricken for failure to file a credit counseling certificate; thereby signaling debtor's awareness to the requirement; whether a secured creditor was sought to be stayed by the filing; whether the debtor is acting in concert with others to forestall a secured creditor; whether the debtor has filed all the required schedules and statements with the petition; whether there was little or no effort to reorganize in prior filed cases; or other indications that a debtor is abusing the protections of the automatic stay.²³²

By reviewing petitioners on a case-by-case basis instead of a one-remedy-fits-all approach, the *Elmendorf* court left room to punish abusive filing, while preserving the future bankruptcy benefits of petitioners who innocently fail to receive credit counseling. Innocent petitioners will have their petitions stricken, while petitioners deemed abusive will have their petitions stricken with prejudice to future filings under the court's 105(a) powers.²³³

III. PETITIONS FILED IN VIOLATION OF 109(h) SHOULD BE STRICKEN OR, UPON A FINDING OF ABUSE, SHOULD BE STRICKEN WITH PREJUDICE TO FUTURE FILINGS

The arguments advanced by dismissal courts²³⁴ are inconsistent with a plain reading of the statute²³⁵ and the stated legislative intent of the 109(h)

229. *See In re Elmendorf*, 345 B.R. at 503-04.

230. *Id.* at 503.

231. *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).

232. *Id.* at 503 n.24.

233. *Id.* at 504. The *Elmendorf* court determined that Lena Elmendorf filed in good faith and struck her petition whereas Diana Finlay's previous filings indicated abuse of the system. *Id.* The court stated that her petition should be stricken with prejudice to future filings, but because the U.S. Trustee failed to ask for that relief, the petition was stricken. *Id.* Despite her husband's previous filings, the court decided that Shayna Zarnel's petition should be stricken because it was her first filing. *Id.* at 505.

234. *See supra* Part II.A.

235. *See supra* Part II.A.2, B.2.

credit counseling requirement.²³⁶ While the concerns regarding uncertainty with the automatic stay may make the dismissal approach seem appealing,²³⁷ the conclusion that petitions filed in violation of 109(h) commence a case limit the benefits available to individuals in a future filing²³⁸—a result inconsistent with the congressional goal of implementing credit counseling as a “debtor protection.”²³⁹ Furthermore, such an interpretation will give individuals who are ineligible for bankruptcy immediate (albeit temporary) access to the protection of the automatic stay,²⁴⁰ an odd outcome, incompatible with the intent of BAPCPA.²⁴¹

The plain and practical interpretation of BAPCPA is that no case is commenced when a petition is filed in violation of 109(h). The relevant subsections,²⁴² which fall under the subchapter entitled “Commencement of a Case,”²⁴³ provide that a case “is commenced by the filing with the bankruptcy court of a petition . . . by an entity that may be a debtor.”²⁴⁴ Thus, the mere filing of a petition does not commence a case—rather the petition must be filed *by an individual that may be a debtor*.²⁴⁵ To determine whether an individual “may be a debtor,” one must logically turn to section 109 entitled “Who may be a debtor.”²⁴⁶ One of the requirements listed in section 109 to qualify an individual as a debtor²⁴⁷ is the requirement that an individual obtain credit counseling within the 180 days preceding the bankruptcy filing.²⁴⁸ The rational and practical reading of both sections 301 and 109 supports a straightforward argument: (1) Individuals who have not received credit counseling or qualified for a waiver are ineligible to be debtors under section 109; (2) only individuals eligible to be debtors under 109 may commence a case under section 301; therefore (3) a petition filed by an individual who does not receive credit counseling does not commence a case.²⁴⁹ As a result, there is no case to dismiss and the petition must be stricken.²⁵⁰

The *Tomco* court²⁵¹ attempts to bypass this logic by interpreting the words “may be a debtor” to mean the filer only “ha[s] the possibility of being a debtor.”²⁵² While an expansive interpretation of statutory language

236. See *supra* Part I.B.

237. See *supra* Part II.A.3.b.

238. See *supra* notes 128-29 and accompanying text.

239. See *supra* note 49.

240. See *supra* notes 195-99 and accompanying text.

241. See *supra* Part I.B.

242. 11 U.S.C.A. §§ 301-03 (West 2004 & Supp. 2006); see also *supra* note 111.

243. 11 U.S.C.A. ch. 3 subch. 1.

244. *Id.* § 301.

245. See *supra* notes 212-16 and accompanying text.

246. 11 U.S.C.A. § 109.

247. *Id.*

248. *Id.* § 109(h); see also *supra* Part I.A.

249. See *supra* notes 111-14 and accompanying text.

250. See *supra* Part II.B.2.a.

251. *In re Tomco*, 339 B.R. 145 (Bankr. W.D. Pa. 2006).

252. *Id.* at 159; see also *supra* notes 116-17 and accompanying text.

has ample judicial support,²⁵³ such an expansive definition of the word “may” in section 109 is inappropriate because section 109 is itself the more particular defining clause for who “may be a debtor”²⁵⁴ as the language is used in section 301.²⁵⁵ Under the *Tomco* court’s expansive definition of “may” in section 109, a person who fulfilled all of the section 109 requirements would thereby merely have the “possibility” to be a debtor²⁵⁶—and there would be no Code provision that determines who actually is a debtor. This interpretation of section 109 should be rejected as rendering section 109 essentially superfluous.²⁵⁷

As it is a court’s “duty ‘to give effect, if possible, to every clause and word of a statute,’”²⁵⁸ the phrase “may be a debtor” as used in section 109 must mean that section 109 outlines the requirements to *be* a debtor under the Code. Because “the cardinal rule [is] that a statute is to be read as a whole,”²⁵⁹ the phrase “may be a debtor” in section 109 must be read as introducing a clause that will clarify what the words “may be a debtor” are intended to mean as used in section 301.²⁶⁰ The word “may” in section 109 accordingly cannot possibly have a more expansive meaning in section 109 than it does in section 301, which effectively sidelines the *Tomco* court’s semantic argument.²⁶¹ The logical section 109/301 syllogism²⁶² requires the conclusion that petitions filed in violation of 109(h) do not commence a bankruptcy case.

253. See *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) (“The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.”); *In re Copper*, 314 B.R. 628, 637 (B.A.P. 6th Cir. 2006) (“Finally, it is also relevant that section 706(a) uses the word ‘may’ meaning ‘might’ or ‘used to express possibility’ or ‘used to express opportunity or permission.’ If Congress had intended to leave the bankruptcy courts with absolutely no discretion in the matter, it would have used the more mandatory phrase of ‘shall be able to convert.’” (quoting Random House Unabridged Dictionary, *supra* note 117, at 1189)).

254. 11 U.S.C.A. § 109.

255. *Id.* §§ 109, 301; see also Rosendorf, *supra* note 215. It is imperative to read section 109 and 301 together because “the cardinal rule is that the statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991).

256. See *supra* notes 116-17 and accompanying text.

257. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (1984) (Edwards, J., concurring) (“There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it ‘inoperative or superfluous, void or insignificant.’” (quoting 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th ed. 1973))); see also *supra* note 107.

258. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

259. *King*, 502 U.S. at 221.

260. See *supra* note 156 and accompanying text.

261. See *supra* notes 115-17 and accompanying text.

262. See *supra* notes 242-50 and accompanying text.

The “surplusage” argument²⁶³—that striking petitions would render a provision of BAPCPA superfluous—is also without merit. The *Elmendorf*²⁶⁴ court rejected this argument by breathing meaning back into section 362(b)(21)(A) with the distinction between the curable failure to satisfy section 109(g)²⁶⁵ and the incurable failure to satisfy section 109(h).²⁶⁶ This distinction effectively nullifies the 362(b)(21)(A) surplusage argument.²⁶⁷

Other provisions of BAPCPA also lead to the conclusion that individuals ineligible under 109(h) cannot commence a case.²⁶⁸ Although there are many BAPCPA provisions that deal with dismissal of a bankruptcy case,²⁶⁹ not one of these provisions indicates that failure to obtain credit counseling is grounds for dismissal.²⁷⁰ While the *Tomco* court makes a convincing argument that cause for dismissal should not necessarily be limited to enumerated statutory lists,²⁷¹ Congress did not list failure to obtain credit counseling among the many causes for dismissal included in the same statute that created this requirement.²⁷² This is a strong indication that an individual ineligible under 109(h) has no case to dismiss. In fact, the only other clause in BAPCPA that mentions 109(h) eligibility is the section 521(b)(1) requirement that a certificate of credit counseling be filed with the court.²⁷³ The failure to submit this certificate, however, is not listed as a cause for automatic dismissal for failure to file certain documents under 521(i).²⁷⁴

Furthermore, the absence of 109(h) ineligibility as a cause for dismissal²⁷⁵ correlates with the congressional intent of credit counseling as a debtor protection.²⁷⁶ If a petition filed in violation of 109(h) commences a case, which must be subsequently dismissed because the individual failed to receive credit counseling, the petitioner would be penalized through a

263. See *supra* Part II.A.2.c.

264. 345 B.R. 486 (Bankr. S.D.N.Y. 2006).

265. See *supra* notes 174-77 and accompanying text.

266. See *supra* notes 178-81 and accompanying text; see also *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (“[O]ur preference for avoiding surplusage constructions is not absolute.”).

267. See *supra* Part II.A.2.c.

268. See *supra* Part II.B.2. While some dismissal courts look to pre-BAPCPA jurisprudence regarding section 109(g), the *Salazar* court was right to conclude that due to contradictions in pre-BAPCPA 109(g) interpretations, “regardless of one’s view on § 109(h), § 109(g)’s treatment in case law cannot be entirely instructive.” *In re Salazar*, 339 B.R. 622, 632 (Bankr. S.D. Tex. 2006); see also *supra* Part II.A.1.a. The *Salazar* court was also correct to point out that, prior to BAPCPA’s addition of section 362(c)(3), the determination of whether to dismiss a case or strike a petition was a “difference without a distinction.” *In re Salazar*, 339 B.R. at 633; see also *supra* Part II.B.1.a.

269. See 11 U.S.C.A. §§ 521(i), 707, 1112, 1208, 1307 (West 2004 & Supp. 2006).

270. See *supra* Part II.B.2.b-c.

271. See *supra* notes 91-100 and accompanying text.

272. See *supra* Part II.B.2.b-c.

273. See *supra* Part II.B.2.c.

274. *Id.*

275. See *supra* Part II.B.2.b-c.

276. See *supra* note 49.

bad-faith presumption in a second filing.²⁷⁷ This result is directly at odds with the congressional intent of employing credit counseling as a debtor protection.²⁷⁸

Allowing individuals who have not received credit counseling to nevertheless commence a case is also at odds with the congressional intent of “eliminat[ing] abuse in the system”²⁷⁹ and the belief that “bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort.”²⁸⁰ If petitions filed in violation of 109(h) commence a case, then those same ineligible petitioners are protected by the automatic stay until the case is dismissed.²⁸¹ Thus, an individual who has not obtained credit counseling could nonetheless invoke “one of the most powerful weapons known to law.”²⁸² The automatic stay protects a debtor from collection actions by creditors;²⁸³ under the dismissal theory, an individual could file a petition without obtaining the credit counseling and gain the benefit of the automatic stay.²⁸⁴ It is difficult to see how this interpretation would correlate with the attempt to curb abuse in the system²⁸⁵ and make bankruptcy a last resort.²⁸⁶ Although dismissal courts point to section 362(c)(3) as a built-in restraint on serial filings,²⁸⁷ this provision would not stop an individual from filing again and again solely to realize the benefits of the automatic stay for a few days,²⁸⁸ or long enough to figure out how to prevent a collection action. While there will always be those who seek to circumvent the system, it is important to observe the abuse that could occur under both remedies.²⁸⁹

If courts strike petitions, an ineligible petitioner would not have the protection of the automatic stay,²⁹⁰ but could file a second petition without the 362(c)(3) bad faith presumption.²⁹¹ Hypothetically, an individual could file, refile, and refile *again* with no consequence. But there would not be

277. See 11 U.S.C.A. § 362(c)(3); see also Part II.B.3.b.

278. See *supra* Part I.B. Professor Block-Lieb argues that debtor protections with harsh penalties for non-compliance are actually debtor punishments. See Block-Lieb, *supra* note 201, at 427, 429.

279. See H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2 (2005).

280. See *id.* at 4.

281. See *supra* note 103.

282. *In re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988); see also *In re Walker*, 51 F.3d 562, 566 (5th Cir. 1995) (“The automatic stay is designed to protect debtors from creditors and creditors from each other.”).

283. See *supra* note 60 and accompanying text; see also 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2006).

284. See *supra* notes 195-97 and accompanying text.

285. See *supra* note 36 and accompanying text.

286. See *supra* note 38 and accompanying text.

287. See *supra* notes 124-27 and accompanying text.

288. See *supra* note 197 and accompanying text.

289. See *supra* Part II.A.3.a, B.3.a.

290. See *supra* notes 187-94 and accompanying text. But see *supra* notes 212-16 and accompanying text.

291. See *supra* notes 199-200 and accompanying text.

much benefit. The ineligible individual would never receive the automatic stay²⁹² and would not be able to prevent a collection action until the 109(h) credit counseling provision is satisfied.

Of these two potentially “abusive” alternatives,²⁹³ the former is clearly the worse. Allowing an individual repeatedly to invoke the protections of the automatic stay is undoubtedly at odds with the congressional intent of BAPCPA as a means to reduce abusive behavior²⁹⁴ and “restore[] personal responsibility and integrity in the bankruptcy system.”²⁹⁵ Striking petitions filed in violation of 109(h) and keeping the automatic stay out of the ineligible petitioner’s reach is most congruent with the purpose of the statute.

Striking petitions undoubtedly creates a level of uncertainty with regards to the automatic stay,²⁹⁶ and this uncertainty, admittedly, is avoided by the dismissal courts.²⁹⁷ Eliminating this uncertainty, however, is not worth the price of giving individuals who have failed to obtain credit counseling the right to commence cases repeatedly in order to invoke the automatic stay.²⁹⁸ The stated congressional intent of BAPCPA is to curb abuse of the system and restore personal accountability.²⁹⁹ Dismissal courts would tolerate more abuse to reduce uncertainty,³⁰⁰ while striking courts would tolerate more uncertainty to reduce abuse.³⁰¹ Congress has made its choice clear.³⁰² The House Report on BAPCPA³⁰³ is filled with discussion of abusive debtor practices and has an overarching goal of eliminating bankruptcy abuse.³⁰⁴ Congress has chosen to curb abuse even if uncertainty increases.³⁰⁵ “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice,”³⁰⁶ and courts accordingly should seek to minimize abusive practices even at the expense of uncertainty in the system.³⁰⁷

292. See *supra* notes 204-07 and accompanying text.

293. See *supra* notes 279-92 and accompanying text.

294. See *supra* note 36 and accompanying text.

295. H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2 (2005).

296. See *supra* notes 204-06 and accompanying text.

297. See *supra* Part II.A.3.b.

298. See *supra* notes 279-89 and accompanying text.

299. See *supra* Part I.B.

300. See *supra* notes 195-98 and accompanying text.

301. See *supra* Part II.B.3.c.

302. See *supra* note 210 and accompanying text.

303. See H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. Rep. No. 109-31(I), at 2 (2005).

304. See *supra* notes 35-38 and accompanying text.

305. See *supra* notes 206-11 and accompanying text.

306. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987); see also *Mansell v. Mansell*, 490 U.S. 581, 594 (1989) (“Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice.”).

307. Uncertainty in the judicial process is not unique to bankruptcy law. See *supra* note 210.

Hence, a petition filed in violation of 109(h) should not commence a bankruptcy case.

Finally, the outcome that most adheres to the legislative purpose of BAPCPA³⁰⁸ is to not merely strike petitions, but to consider whether a petition should be stricken “with prejudice to future filings.”³⁰⁹ This remedy is in line with courts’ section 105(a)³¹⁰ powers and allows a situation-oriented remedy.³¹¹ An individual showing signs of abusive practices³¹² would not only have their petition stricken, but would be prevented from filing again in the future.³¹³ An individual filing *pro se*, on the other hand, who filed at the last minute to prevent foreclosure of a family home would simply have their petition stricken.³¹⁴ This individual would be allowed to obtain credit counseling and refile without the penalty of the 362(c)(3) bad faith presumption.³¹⁵ This solution is most congruent with the dual legislative purposes of curbing abuse³¹⁶ and creating debtor protections³¹⁷ as it allows courts to fashion a remedy for abusive petitioners, while allowing good faith petitioners to obtain credit counseling and refile without consequence.³¹⁸

CONCLUSION

Individuals who have not received credit counseling as required under section 109(h) of BAPCPA should not be treated as having commenced a bankruptcy case, and the proper remedy is to strike the petition. A straightforward reading of sections 109 and 301 demands such an interpretation. Striking petitions of individuals ineligible under 109(h) will also curb abuse of the bankruptcy process by preventing petitioners who have failed to obtain credit counseling from realizing the benefits of the automatic stay. Striking petitions is most consistent with the legislative purpose of BAPCPA and is the proper remedy for a petitioner who has not satisfied the 109(h) credit counseling provision.

308. *See supra* Part I.B.

309. *In re Elmendorf*, 345 B.R. 486, 504 (Bankr. S.D.N.Y. 2006); *see also supra* Part II.C.

310. 11 U.S.C.A. § 105(a) (West 2004 & Supp. 2006).

311. *See supra* note 233 and accompanying text.

312. *See supra* note 232 and accompanying text.

313. *See supra* note 233 and accompanying text.

314. *See supra* note 233 and accompanying text.

315. *See supra* notes 226-28 and accompanying text.

316. *See supra* note 36 and accompanying text.

317. *See supra* note 49 and accompanying text.

318. *See supra* note 227.